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REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between July 17, 1915, and February 15, 1916.

PERRY S. RADER,
REPORTER.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS

HON. ARCHELAUS M. WOODSON, Chief Justice.

HON. WALLER W. GRAVES, Judge.

*HON. JOHN C. BROWN, Judge.

HON. HENRY W. BOND, Judge.

HON. CHARLES B. FARIS, Judge.

HON. ROBERT FRANKLIN WALKER, Judge.

HON. JAMES T. BLAIR, Judge.

*HON. CHARLES G. REVELLE, Judge.

JOHN T. BARKER, Attorney-General.

J. D. ALLEN, Clerk.

H. C. SCHULT, Marshal.

*Note.—On Saturday, September 4, 1915, Hon. John C. Brown, who had been Judge of the Supreme Court since January 1, 1911, died, and Hon. Charles G. Revelle was appointed by the Governor to fill the vacancy, and qualified as Judge on September 11, 1915.

JUDGES OF THE SUPREME COURT

BY DIVISIONS

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HON. WALLER W. GRAVES, Presiding Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. HENRY W. BOND, Judge.

HON. JAMES T. BLAIR, Judge.

HON. STEPHEN S. BROWN, Commissioner.

HON. ROBERT T. RAILEY, Commissioner.

DIVISION TWO.

HON. CHARLES B. FARIS, Presiding Judge.

HON. JOHN C. BROWN, Judge.

HON. ROBERT FRANKLIN WALKER, Judge.

HON. CHARLES G. REVELLE, Judge.

HON. REUBEN F. ROY, Commissioner.

HON. FRED L. WILLIAMS, Commissioner.

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CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE

APRIL TERM, 1915.

(Continued from Vol. 265.)

HERMAN DRAKE et al., Appellants, v. MILTON
HOSPITAL ASSOCIATION et al.

Division Two, July 17, 1915.

1. **LEGITIMATION: Adulterine Bastard.** The statute contemplates the legitimation of adulterine bastards the same as it does other children born out of lawful wedlock whose parents subsequently marry.
2. ———: ———: **Recognition: Presumption.** The marriage, after emancipation, of a man to a woman who while she was a slave gave birth to an illegitimate child, and the subsequent recognition of such child by him as his own, there being evidence that they lived in the same community and none that he did not have opportunity to become the father of such child, although at the time of its birth another woman was his slave wife, raises the presumption that he was the child's father; and if that presumption is not overcome by evidence showing him to have been impotent or otherwise incapacitated to become a father at and prior to the child's birth, such child is to be held legitimate, the same as one born in lawful wedlock.

3. ———: ———¹: **Presumption: Impotency: Instruction.** The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable. Likewise, the presumption that a man who marries the mother of an adulterine bastard and subsequently recognizes such child as his own, was its father, is also rebuttable. And where there is testimony tending to show that at and prior to the child's birth he was impotent, an instruction declaring that he is presumed to have been the child's father from the fact of his marriage of the mother and his subsequent recognition of her illegitimate child as his own, is error, since it ignores and omits any reference to the evidence tending to overcome that presumption.
4. ———: ———: ———: **Evidence of Impotency.** Testimony that the putative father of the illegitimate child had mumps before he knew the child's mother, which he said rendered him impotent through life, and that his scrotum after his death was gone, is evidence tending to establish his impotency.

Appeal from Cole Circuit Court.—*Hon. John M. Williams, Judge.*

REVERSED AND REMANDED.

J. G. Slate, John M. Dawson and Alex. Z. Patterson for appellants.

(1) The court erred in finding for respondents because there was no evidence that Archie Drake was the natural father of Ida Garnett, who claims to inherit from him by reason of the law of descent and distribution, but the evidence was to the contrary. Sec. 341, R. S. 1909; *Mooney v. Mooney*, 244 Mo. 390; *Rockingham v. Mount Holly*, 26 Vt. 653; 5 Cyc. 632, 633, 634.

(2) The court erred in finding for respondents because no testimony was offered but what was entirely consistent with the theory that respondent, Ida Garnett, was not the child of Archie Drake. The burden of proof was on respondents. 5 Cyc. 628; *Pickens' Estate*, 163 Pa. St. 14; *Mooney v. Mooney*, 244 Mo. 390. Respondents' testimony in support of the claim of paternity was utterly lacking in the essential requirements of clearness, certainty and convincing

force. Facts cannot be regarded as proved by evidence merely giving rise to conjecture. *Newcomb v. Jones*, 37 Mo. App. 475; *Warner v. Crandall*, 65 Ill. 195; *Wheelan v. Railroad*, 85 Iowa, 167; *Wilson v. Cobb*, 28 N. J. Eq. 177; *O'Connell v. Clark*, 78 N. Y. Supp. 93; *Land Co. v. Lumber Co.*, 35 S. W. (Tenn.) 886; *Steamship Co. v. Kelly*, 126 Fed. 610. (3) The court erred in finding for the respondents because the evidence was uncontradicted that Archie Drake was married to his first wife long before the respondent, Ida Garnett, was begotten and born, and that he continued to live and cohabit with said first wife until she died in 1870, and that said respondent, Ida Garnett, was begotten during the time he was living with his first wife, to-wit: begotten in 1860 and born in March, 1861. *Sams v. Sams*, 85 Ky. 396; *Kealoha v. Castle*, 210 U. S. 149; *Hall v. Hall*, 26 Ky. L. R. 610; *Tiffany, Persons & Domestic Relations* (2 Ed.), p. 235. (4) The court erred in finding for respondents because there was no evidence that Archie Drake and the mother of the respondent, Ida Garnett, were even acquainted at the time respondent was begotten and born. (5) The court erred in giving declaration of law numbered 4, at the instance of respondents, for the reason that this declaration in effect declares the law to be that no matter who was actually and in fact the father of respondent, Ida Garnett, if Archie Drake afterwards married said respondent's mother and recognized said respondent as his child, that is, held her out to the world as his child, respondent thereby became, in law, Archie Drake's child. This declaration ignored the opening words of Sec. 341, R. S. 1909, to-wit: "If a man, having by a woman a child," etc. *Mooney v. Mooney*, 244 Mo. 390. (6) The court erred in indulging the presumption that Archie Drake's inter-marriage with Julia Smith and subsequent alleged recognition of respondent, Ida Garnett, as his daughter, was either persuasive or conclusive proof that

Archie Drake was in fact the father of Ida Garnett. In so doing the court disregarded one of the strongest presumptions known to the law and one which the law ever makes; that is, the presumption of innocence, which applies to civil as well as criminal actions. Archie Drake was a married man at the time Ida Garnett was conceived and born and in law he must be presumed to be innocent of the criminal offense of adultery, until the contrary is shown by competent testimony. *Klein v. Laudman*, 29 Mo. 259; *Johnson v. Railroad*, 203 Mo. 381; *Maier v. Brock*, 222 Mo. 74; 16 Cyc. 1081; *Childs v. Merrill*, 66 Vt. 302.

Pope & Lohman and *Irwin & Peters* for respondents.

Respondents cite the following authorities in support of their position, from this State and other jurisdictions having statutes similar to ours in regard to legitimating children born before marriage of parents: *R. S.* 1909, sec. 341; *Gates v. Seibert*, 157 Mo. 271; *Breidenstein v. Bertram*, 198 Mo. 347; *Nelson v. Jones*, 245 Mo. 579; *Jackson v. Phalen*, 237 Mo. 142; *Martin v. Martin*, 250 Mo. 549; *Adger v. Ackerman*, 115 Fed. 124; *Mooney v. Mooney*, 244 Mo. 372; *Kealoha v. Castle*, 210 U. S. 149; *Brewer v. Blougher*, 14 Pet. 178; *Hawbecker v. Hawbecker*, 43 Md. 516; *Ives v. McNicoll*, 59 Ohio St. 402; *Carroll v. Carroll*, 20 Tex. 732; *Munson v. Palmer*, 8 Allen, 551; *Adams v. Adams*, 36 Ga. 236; *State v. Lavin*, 80 Iowa, 556; *Stein v. Stein*, 106 S. W. 861; *Rockingham v. Mount Holly*, 26 Vt. 653, 1 L. R. A. (N. S.) 773; *Harvey v. Ball*, 32 Ind. 98; *Bailey v. Boyd*, 59 Ind. 292; *Binns v. Dazey*, 147 Ind. 536; *Alston v. Alston*, 86 N. W. 55; *Brown v. L. of H.*, 107 Iowa, 439; *Hunter v. Whitworth*, 9 Ala. 965; *Dannilli v. Dannilli*, 67 Ky. 51; *Colwell's Succession*, 34 La. Ann. 265; *Hart v. Ross*, 26 La. Ann. 90; *Brewer v. Hamor*, 83 Me. 251; *Adams v. Adams*, 154 Mass.

290; *In re Oliver*, 184 Pa. St. 306; *McGunnigle v. McKee*, 77 Pa. St. 81; *Adams Estate*, 6 Pa. Co. Ct. 591; *In re Mathias*, 63 Fed. 523; 5 Cyc. 634; *VanHorn v. VanHorn*, 107 Iowa, 247; *Miller v. Pennington*, 218 Ill. 220; *Scanlon v. Walshe*, 81 Md. 118; *Eddie v. Eddie*, 8 N. D. 376; *In re Gird's Estate*, 157 Cal. 534; *Blythe v. Ayres*, 96 Cal. 532; *Allison v. Bryan*, 21 Okla. 557. Children born before the marriage of their parents, who afterwards intermarry, although the father may have a living wife or been laboring under some other disability, are legitimated by the marriage, after the disability was removed, and recognition thereafter. *Miller v. Pennington*, 218 Ill. 220; *Carroll v. Carroll*, 20 Tex. 732; *Brewer v. Blougher*, 14 Pet. 178; *Hawbecker v. Hawbecker*, 43 Md. 516; *Ives v. McNicoll*, 59 Ohio St. 402; *Adams v. Adams*, 36 Ga. 236; *Scanlon v. Walshe*, 81 Md. 118; *Eddie v. Eddie*, 8 N. D. 376. The intermarriage, after the birth of the child, and the husband's acknowledgment that the child was his, are prima-facie evidence that he was the actual father, and entitles the child to a pension if the father dies and the mother remarries. *U. S. v. Skam*, 5 Crank C. C. (U. S.) 367. Laws should be liberally construed in favor of legitimacy. *State v. Lavin*, 80 Iowa, 561; *Rockingham v. Mount Holly*, 26 Vt. 653; *Brewer v. Hamor*, 83 Me. 251; *Adams v. Adams*, 154 Mass. 290.

ROY, C.—This is an ejectment suit for land in Jefferson City. Defendant had judgment, and plaintiffs have appealed.

Archie Drake died intestate in 1907 seized of the land. The plaintiffs are his collateral kin, residents of Virginia, where Archie was born a slave. Defendant Ida Lee Garnett claims the land as the only child of Archie Drake. The other defendants are in possession as her tenants. Archie Drake was brought by his owner to Jefferson City before the Civil War and lived there the remainder of his life. He had a slave wife

several years before the war. Her name was Betsy, and they lived together until her death about 1870. They had no children. A few months after Betsy's death he married Julia Smith, who was then the mother of an illegitimate child about nine years old, known up to that time as Ida Lee Smith, now the defendant Ida Lee Garnett.

One witness, John Barnes, testified for defendants that Archie, before his marriage with Julia, called Ida his daughter. Witnesses for plaintiffs testified that he denied that he was the father of Ida, and one witness stated that he said that Ida was the child of her mother's old master. There was much gossip to the same effect.

The undisputed evidence shows that after the marriage of Archie and Julia, Ida became a member of their family and remained such until her marriage to James H. Garnett in 1888. She was known in the family and elsewhere as Ida Lee Drake. By that name she was enrolled in, and graduated from, Lincoln Institute, and enrolled in Oberlin College. In that name she was baptized, and later given in marriage by Archie Drake at his home, the wedding being described as a "fine lay out." Archie Drake from the time of his marriage with her mother treated Ida as his child and called her "daughter." One witness stated that he said she was his daughter "by blood." He had no other children. Some of the witnesses for plaintiff stated that he said that he had the mumps when young and that it made him so that he could not become the father of children. One witness stated that he saw him after he was dead and that his scrotum was gone. The undertaker who had charge of his funeral testified that he saw nothing abnormal in his appearance in that respect. It was stated by some of plaintiffs' witnesses that his ordinary appearance and voice were those of a normal unemasculated man. There was no direct evidence that Archie Drake and Julia

were acquainted with each other at the time of Ida's birth. The trial was before the court sitting as a jury, and the issues were at law and not in equity.

The court at the instance of the defendants gave the following declaration of law, over the objection of plaintiffs:

"4. The court further declares the law to be that if Ida Drake, now Garnett, was the illegitimate child of Julia Smith, and that the said Julia Smith afterwards intermarried with Archie Drake, and that the said Archie Drake took the said Ida into his home, supported her, educated her, held her out as his own child, introduced her into society as his child and recognized her as his child, then in that event the law presumes that she was the child of Archie Drake."

I. Appellants say that as Archie Drake was the husband of Betsy when Julia's child, Ida, was begotten, his subsequent marriage to Julia and recognition of Ida as his child did not render Ida legitimate. They say that, under such circumstances, Ida was an adulterine bastard and incapable of legitimation under the civil law, the law of Scotland, the Code Napoleon and the common law; and that our statute should not be construed to have an effect not permitted under those laws. They cite *Sams v. Sams' Admr.*, 85 Ky. 396. That was a case involving the same kind of a statute as ours, and the child was an adulterine bastard as here. It was held that the statute did not contemplate such a case and that the child was not legitimated by the subsequent marriage of her parents and the father's recognition of her as his child. The court said: "To construe the statute by its letter in this case would not only conflict with the legislative intent, but would encourage the faithless husband to pursue his immoral practices, and invite his concubine to terminate by intrigue, and perhaps crime, the existence of the marital relation."

Legitimation
of Adulterine
Bastards.

In *Hawbecker v. Hawbecker*, 43 Md. 516, a married man became the father of several children by a woman other than his wife. Subsequently his wife died and he married the mother of the illegitimate children and acknowledged them as his. The statute of that state was in substance the same as ours. In opposition to the claims of legitimacy by those children under that statute, it was urged that such statute was borrowed from the civil law, and that under that law adulterine bastards could not inherit for various reasons of public policy therein stated. The court in that case, l. c. 519, answering such objections, said: "But it must be a very clear case of intent to justify a departure from the words of the law. It would be dangerous and unwarrantable for a court to grope for an intent, or to make one from their own ideas of policy and morals, and on that ground, say that a particular case is withdrawn from the operation of the plain and unambiguous language of a statute."

Ives v. McNicoll, 59 Ohio St. 402, involved the question of the legitimacy of a child of a married woman by a man other than her husband, the mother having been subsequently divorced from her first husband and having married the father of the child. The statute of that state was in effect the same as here. The court said that it was the intention of the statute to abolish the rule of the civil law, the law of Scotland and the Code Napoleon against adulterine bastards and to do justice to the innocent off-spring. It was there said:

"There can be no public policy in this State in conflict with a valid statute of the State. Public policy must always yield to a valid statute. The General Assembly has the power to enact a law legitimating adulterine bastards, and there would be no absurdity in so doing. Neither would such a statute disturb the general law protecting the marriage relation nor the law of crimes and misdemeanors, nor the law as to

public morals. The subject of marriage and divorce, and the subject of adultery and fornication, and the subject of public morals are all carefully provided for and protected by separate chapters and sections of our statutes, and if the General Assembly desired to prevent adulterine bastards from becoming legitimated, some provision to that effect would be found in some of the statutes."

Our attention is called to *Kealoha v. Castle*, 210 U. S. 149. That case originated in Hawaii. Their statute reads: "All children born out of wedlock are hereby declared legitimate on the marriage of the parents with each other, and are entitled to the same rights as those born in wedlock." It was held that, as the court of last resort of Hawaii in a previous case had decided that an adulterine bastard could not be legitimated by that statute, it was proper to follow that decision in a case coming from Hawaii. That case expressly disclaims any ruling as to a case originating elsewhere than in those islands.

In our opinion our statute is so clear and authoritative that no place is left for judicial limitation of its terms. That statute contemplates the legitimation of adulterine bastards the same as others.

II. Appellants say that the court erred in giving the fourth declaration of law for the defendants, which, in effect, says that if Archie Davis, after his marriage with Julia, recognized Ida as his
Instruction. child, then the law presumes that she is his child.

In *Adger v. Ackerman*, 115 Fed. 124, decided in the Circuit Court of Appeals of the Eighth Circuit, Judge THAYER, in a concurring opinion, said: "In the present case it is not necessary to adopt the extreme view that recognition of an illegitimate child by a man who has married its mother is conclusive proof of paternity which no evidence can overturn, and

hence that the legitimacy of a child born out of wedlock, if it is recognized, by force of the statute is placed on a firmer foundation than the legitimacy of a child born in lawful wedlock, and no decisive opinion need be expressed on that point. I think that it is true, however, that by the recognition of a child born out of wedlock, under the circumstances aforesaid, such a child is placed in the same favorable position as one born during wedlock; that it can only be rendered a bastard, after such recognition, by the same kind of proof which is required to overturn the legitimacy of a child born in the course of wedlock; and that it is entitled to the benefit of the same presumptions." That language was approved by Fox, J., in *Breidenstein v. Bertram*, 198 Mo. l. c. 347.

After the marriage of Julia and Drake and after his recognition of Ida as his child, she stood in the same position as a child born in lawful wedlock.

Lawson on Presumptive Evidence, page 143, says: "In *Hargrave v. Hargrave*, 9 Beav. 552, Lord LANGDALE laid it down that the presumption that a child born of a married woman is legitimate may be rebutted by showing that the husband was: (1) Incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must in the course of nature have been begotten; (4) only present under circumstances affording clear and satisfactory proof that there was no sexual intercourse. And in answer to the House of Lords the judges laid down the rule thus: Where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time when by such intercourse the hus-

band could, according to the laws of nature, be the father of the child.”

While there is no direct evidence in the case that Archie Drake and Julia were acquainted with each other at the time that Ida was begotten, yet they both lived at that time in or near Jefferson City, and there is no evidence in the cause tending to show that he did not have the opportunity to become the father of Ida. In other words, there is no evidence of non-access. On the other hand, there is evidence as to Archie Drake's impotency. The fourth declaration of law above mentioned improperly ignored that evidence. There should have been added to it the following “unless the court finds from the evidence that at the time said Ida was begotten Archie Drake was physically incapable of begetting a child.”

The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable. It is overcome by proof of impotency on the part of the husband. The failure to submit that issue by the declaration of law above mentioned shows that the trial court did not consider the evidence on the question of impotency. We express no opinion on the weight of that evidence, but hold that it is the duty of the court or jury trying the case to consider that evidence.

The judgment is reversed, and the cause remanded. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Rox, C.*, is adopted as the opinion of the court. All the judges concur.

THE STATE ex rel. CHARLES STUEVE v.
GEORGE D. REYNOLDS et al., Judges of St.
Louis Court of Appeals.

Division Two, July 17, 1915.*

1. **MANDAMUS: No Plea to Return.** Unless relator pleads to respondent's return to an alternative writ of mandamus, either by motion for judgment on the pleadings, demurrer, answer, or such other proper plea as will join an issue for determination, especially where the return sets up material facts in conflict with the allegations in the writ, the alternative writ will be discharged and the proceedings dismissed. The statute (Sec. 2547, R. S. 1909) requires relator to "plead to or traverse all or any material facts contained in such return," and unless there is some appropriate plea no issue is joined or is raised for determination; and such has been the law since the revision of the statutes in 1845 (R. S. 1845, Ch. 112), and by them the common-law practice of bringing proceedings by mandamus to an issue was superseded.
2. ———: ———: **Neglect to Plead.** Where the cause has been pending in the Supreme Court after respondent's return a sufficient length of time to have enabled relator to plead to said return, and he has not filed any pleading to bring the cause to an issue or attempted to obtain further time in which to plead, the alternative writ will be discharged.

Mandamus.

**ALTERNATIVE WRIT DISCHARGED AND PROCEEDING DIS-
MISSED.**

H. W. Johnson, A. H. Drunert and W. C. Hughes
for relator.

Emil Roehrig and T. W. Hukriede for respond-
ents.

*Note.—Decided May 25, 1915. Motion for rehearing overruled July 6, 1915. Motion to transfer to Court in Banc overruled July 17, 1915.

WILLIAMS, C.—This is an original proceeding by mandamus to compel the judges of the St. Louis Court of Appeals to set aside its order dismissing the appeal in the cause entitled “State of Missouri, Respondent, v. Charles Stueve, Appellant,” and to require them to reinstate the cause on its docket and to proceed to hear and determine the same.

On account of the conclusions which we have reached in this case, it does not become necessary to set forth the allegations of the pleadings in detail, but a general summary of the facts alleged will be sufficient for the purposes of the question discussed in the opinion.

In his original petition for the alternative writ, which was afterward incorporated into and made a part of the alternative writ, relator states that at the April term, 1911, of the Warren Circuit Court, he was tried and convicted of a misdemeanor, to-wit, of obstructing a public road; that in due time motions for new trial and in arrest of judgment were filed and overruled, and an appeal was duly granted to the St. Louis Court of Appeals. The appellant was given time to file his bill of exceptions, which time for filing bill of exceptions was from time to time extended, the last extension being to May 1, 1914. That on February 13, 1914, the respondent’s attorney in said cause filed in the St. Louis Court of Appeals an abstract of the judgment of conviction in said cause, together with a motion to dismiss defendant’s appeal therein, “for want of prosecution or for delay on the part of defendant in preparing and filing his bill of exceptions” and perfecting his appeal, which motion to dismiss was, by said Court of Appeals, sustained; that he thereupon filed a motion for a rehearing and made a showing to said court that the delay in perfecting the appeal was through no lack of diligence upon his part; that said motion for a rehearing was overruled.

The petition states further facts which, if true, would show that the delay in perfecting the appeal was not due to any negligence or want of diligence upon the part of relator, but was caused by the official stenographer of said circuit court in misplacing or losing his shorthand notes of a part of the testimony; that finally the transcript was completed and on March 20, 1914, the bill of exceptions in said cause was completed, properly approved and signed, and, on April 16, 1914, said bill of exceptions was duly filed with the clerk of said circuit court and by him duly entered upon the records of said court, and that relator (appellant in said cause) is now ready to file in said Court of Appeals a full and complete transcript in said cause as required by law. That the action of said Court of Appeals in dismissing said appeal is without warrant or authority of law, and leaves the relator without remedy or redress.

The alterantive writ was issued and served upon respondents. Later respondents filed a motion to quash the alternative writ, but it appears that nothing further was done with the motion to quash, and it must be considered as an abandoned pleading, since the respondents on the return day filed their return to the alternative writ. The return sets forth in substance the steps leading up to the dismissal by the Court of Appeals of the appeal in the misdemeanor case, and also the overruling of a motion for a rehearing, and states that, upon the hearing, both parties filed affidavits concerning the cause of the delay in perfecting the appeal, and that after due hearing and consideration of the facts therein presented the Court of Appeals dismissed the appeal. Further facts are set forth in the writ which, if true, would show that the appellant in the misdemeanor case (relator here) did not use diligence in perfecting his appeal, but that the delay was largely due to his own negligence or inactivity in the matter in failing to order from the offi-

cial stenographer, within a reasonable time after the case was determined in the trial court, a transcript of the evidence.

It thus appears that the facts alleged in the return are in direct conflict with those stated in the alternative writ with reference to the diligence exercised by the relator in perfecting his appeal in the misdemeanor case. The relator has not pleaded to or traversed the return.

The alternative writ of mandamus in the case was issued May 13, 1914. On July 6, 1914, respondents filed their return. The case was originally docketed for the October, 1914, term of this court. At that term

Mandamus: No Plea to Return.	the case was continued upon stipulation of the parties to the January call. The case was then docketed on the January,
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1915, call and was, on the day set, submitted upon the briefs of the respective parties without oral argument. Upon examining the pleadings in the case, we have reached the conclusion that there is nothing before us for determination, for the reason that no issue has been joined by the pleadings. Article 9 of Chapter 22, Revised Statutes 1909, prescribes the method of making up the issues in mandamus suits. By section 2547 of said article it is provided: "When any writ of mandamus shall be issued, and return shall be made thereto, the person suing out or prosecuting such writ *shall* plead to or traverse all or any of the material facts contained in such return." The case stands here upon the alternative writ and the return.

Relator should have pleaded to the return by motion for judgment upon the pleadings, demurrer, answer, or such other proper plea as would have joined, or carried forward for joining, an issue for determination. The rule at common law was different. "At common law, and prior to the Statute of Anne, no pleadings were allowed in mandamus beyond the return, and the court proceeded to summarily hear and

dispose of the application upon the alternative writ and the return, the latter being taken as conclusive. The return not being traversible, the only remedy of the relator, in case it proved false, was by an action on the case for a false return. This remedy, however, he was not at liberty to adopt until judgment had upon the sufficiency of the return." [High, Extraordinary Remedies (3 Ed.), sec. 457.] The sufficiency of the return was brought up for determination by relator moving for a *concilium*. [The King v. Mayor and Aldermen of London, 3 B. & Ad. 255, l. c. 280.] *Concilium* in the sense here used is defined as an "argument in a cause, or the sitting of the court to hear argument." [Black's Law Dictionary.] "A motion for a *concilium*, or day for the argument of a cause, was formerly moved for upon reading the record in court, but now it is a motion of course. [2 Tidd's Practice, 737-739.]" [1 Burrill's Law Dictionary & Glossary, 337.]

But in order to provide that the proceedings upon writs of mandamus in certain specified cases might be made more speedy and effectual than was possible under the common-law procedure in that behalf Parliament in 1710 passed the Statute of Anne (9 Anne, chap. 20). That statute, authorizing a new procedure in mandamus cases relating to municipal corporations and certain officials, provided in part as follows:

"As often as in any of the cases aforesaid, any writ of mandamus shall issue out of any of the said courts, and a return shall be made thereunto, *it shall and may be lawful* to and for the person or persons suing or prosecuting such writ of mandamus, to plead to, or traverse all or any of the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a

false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *feri facias*, or *elegit*; and a peremptory writ of mandamus shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit to be levied in manner aforesaid."

In 1825, the General Assembly of Missouri passed an act "to regulate proceedings upon mandamus." [2 R. S. 1825, p. 522.] Said statute is almost an exact copy of the Statute of 9 Anne except that it extends to all proceedings by mandamus. The above Act of 1825 was for some unknown reason omitted from the revision of the statutes of 1835, but in 1836 the General Assembly again re-enacted the statute in practically the same form as the 1825 act. [See Laws 1836, p. 72.]

In 1845 the General Assembly made a general revision of the laws of this State and in so doing revised the statute on mandamus into its present form (See Chap. 112, R. S. 1845), which statute as then amended has been carried forward from one revision session to another and is now contained in article 9, chapter 22, Revised Statutes 1909. The change or amendment made in 1845 was slight in phraseology but

it was a very important one. The acts of 1825 and 1836 had followed the Statute of Anne in that they provided that when a return was made "*it shall be lawful*" for the relator to plead to or traverse the return; while the act of 1845 provided that when a return is made the relator "*shall* plead to or traverse" the return. Under the Statute of Anne, it was optional with the pleader (relator) as to whether he would plead to or traverse the return, or fail to plead further and fall back upon his action if any, upon a false return. [The King v. Mayor and Aldermen of London, *supra*, l. c. 280.] But under the Act of 1845 it was made compulsory upon the relator to plead to or traverse the return. An interesting historical side light, showing the probable source of the amendment made in 1845 is contained in the following excerpt taken from the "Preface" to the Revised Statutes of Missouri 1845, prepared by William Claude Jones, then Commissioner for the Publication of the Revised Laws:

"At the session of the Legislature of 1842-3 an act was passed appointing Hon. William Scott, Hon. William B. Napton and Henry S. Geyer, Esq., as revisors of the laws, with powers to revise and digest the whole body of the general laws of the State, and report the same to the next session of the General Assembly. Mr. Geyer declined the office, and the Hon. James W. Morrow was appointed in his place. When the Legislature met in 1844, the revisors reported their revision, apparently prepared with much ability and care. The laws, as reported by them, were referred to a joint committee on revision, and were reported back with but few changes." [R. S. 1845, p. vii.]

So it would appear that the Missouri statute as amended or revised by the Act of 1845 (the amendment being made, no doubt, upon the suggestion of the above named distinguished jurists and legal scholars) entirely superseded the common law practice with ref-

erence to the procedure in bringing proceedings by mandamus to an issue.

It therefore follows that no issue has been joined by the pleadings in the present case and that there is nothing before us for determination. And since the matter was pending in this court, prior to submission, a sufficient length of time to have enabled the parties, if they had so desired, to bring the cause to an issue, but no further attempt so to do having been made nor further time in that behalf requested, it follows that the alternative writ heretofore issued in the cause should be discharged and the proceeding dismissed. It is so ordered.

Roy, C., concurs.

PER CURIAM.—The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

MARY E. MILLER, v. SOUTHERN PACIFIC COMPANY, Appellant.

Division One, August 9, 1915.*

1. **PRACTICE: Foreign Tort.** In a suit in a circuit court of this State for damages resulting from a tort committed in another State, all matters of practice are governed and must be determined by the laws of this State.
2. **DEFINITION: Due Care: Negligence.** Due care is a care adjusting itself to the circumstances of the case, and negligence is the absence of that care.
3. **ALIGHTING FROM CABOOSE: Stock Train: Caretaker.** A caretaker, who accompanies and rides in a stock car in a freight train for the purpose of caring for the animals, and who leaves it when it stops in the terminal yards to go to the caboose for

*Note.—Opinion filed June 30, 1915. Motion for rehearing filed; motion overruled August 9, 1915.

the purpose of obtaining a block with which to repair a partition in that car, may alight from the caboose anywhere it may be standing within the limits of the yard, unless some local element of unsuitability should appear.

4. ———: ———: ———: **Contributory Negligence.** A caretaker, who is authorized by his transportation contract to ride in the stock car for the purpose of caring for the animals, and who, when the train stops in terminal yards finds that a partition in the car needs repairing and is told by a trainman that he can obtain the block he needs at the caboose, which is the next car, and thereupon leaves his car and safely enters the caboose, and while there, without his knowledge or the knowledge of the experienced brakeman also present, the caboose is moved to an undecked open bridge fifty feet high, of which he knows nothing, and having, four or five minutes later, received the block, and not knowing or being informed that the caboose is on the bridge, turns and leaves it by way of its steps, the time being dark and there being no lights which enable him to see the situation, is not guilty of contributory negligence in stepping off into the dark abyss.
5. ———: ———: ———: **Negligence of Railroad.** A railroad company, which, for its own profit, requires shippers of stock and their caretakers, strangers to its road and yards, to care for the stock in transit, and to get on and off the cars whenever and wherever necessary for that purpose, in the nighttime as well as by day, and without reference to the stations used for receiving and discharging other passengers, the inducement being more of a command than an invitation, is in duty bound to exercise a care for the safety of such caretakers as broad as the peculiar conditions and dangers attending their rightful movements; and does not exercise the high degree of care that the law exacts from a carrier for the protection of the lives of its passengers, when it permits its caboose, which it has invited such caretaker in the performance of his duties to enter, while standing in a place of safety, to be run upon an open bridge over a rocky canyon forming a part of its terminal yards, without warning or other notice of the situation to the caretaker.
6. **EXCESSIVE VERDICT:** Under California Statute: \$18,000. The statute of California authorizes the heirs of one negligently killed to recover "such damages as under the circumstances of the case may be just;" and the courts of that State have held that these words confine the recovery to pecuniary damages alone, but that these do not consist simply of compensation for the destruction of legal rights, but include also the loss to the heir of the society, comfort and care of deceased, and the destruction of those kindly relations of which the heir has the

Miller v. Railroad.

moral right to expect the continuance. *Held*, that a verdict for eighteen thousand dollars for an aged and infirm widow, who lived alone with deceased, an unmarried son aged forty-seven years, a lawyer whose income was from \$2500 to \$3000 a year, domestic in his habits, spending all his evenings with her and supporting her entirely from his own income, negligently killed in California, is too large by eight thousand dollars.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb*, Judge.

AFFIRMED (*conditionally*).

Watson, Gage & Watson for appellant.

(1) The court erred in overruling defendant's demurrer at the close of plaintiff's case, and erred in refusing to instruct the jury at the close of all the evidence to return a verdict for the defendant. *Nagle v. Railroad*, 88 Cal. 86; *Boyd v. Railroad*, 105 Mo. 371; *Blevans v. Railroad*, 3 Okla. 512; *Railroad v. Murray*, 113 Ga. 1021; *Kellogg v. Smith*, 179 Mass. 595; *Buckley v. Railroad*, 161 Mass. 26; *Beach on Contributory Negligence*, sec. 161; *I. C. R. Co. v. Green*, 81 Ill. 19; *Wallace v. Railroad*, 98 N. C. 494; *Michell v. Railroad*, 51 Mich. 236; *Frost v. Railroad*, 92 Mass. 387. (2) The court erred in giving instruction number 3 on the measure of damages for plaintiff. *Simoneau v. Railroad*, 159 Cal. 494; *Burk v. Arcadia*, 125 Cal. 364; *Green v. Railroad*, 122 Cal. 563; *Pepper v. S. P. Co.*, 105 Cal. 389; *Harrison v. St. Ry. Co.*, 116 Cal. 156; *Morgan v. St. Ry. Co.*, 95 Cal. 510, 29 Am. St. 123; *Duvall v. Hunt*, 24 Fla. 85; *Hutchins v. Railroad*, 44 Minn. 546; *I. C. R. Co. v. Crudup*, 63 Miss. 291; *Jackson v. Traction Co.*, 59 N. J. L. 925; *Mansfield C. & C. Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662; *Vreeland v. Railroad*, 227 U. S. 59; *Dericksen v. Railroad*, 228 U. S. 145; *Swift & Co. v. Johnson*, 138 Fed. 74; *Railroad v. Brown*, 26 Kan. 443; *In re Calif. Nav. & Imp. Co.*, 110 Fed. 670; *Railroad v. Bayfield*, 37

Mich. 215; 4 Sutherland on Damages (3 Ed.), sec. 1273; Tiffany on Death by Wrongful Acts, sec. 174. (3) There was no evidence to support the specific acts of negligence alleged in the petition. See authorities under point one. (4) The plaintiff was guilty of contributory negligence in leaving the caboose at the time and place mentioned in evidence. See authorities under point one. (5) The court erred in admitting testimony that the plaintiff was in feeble health and that plaintiff had suffered a very severe injury which had impaired her health. Mahoney v. Railroad, 110 Cal. 471; Green v. Railroad, 122 Cal. 563; Railroad v. Carroll, 84 Fed. 772, 28 C. C. A. 207; Biscuit Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436; Railroad v. Roy, 102 U. S. 451; Railroad v. Bayfield, 37 Mich. 205; Railroad v. Baches, 55 Ill. 379; Seattle El. Co. v. Hartless, 144 Fed. 379, 75 C. C. A. 317. (6) The damages were grossly excessive. There was no evidence offered showing the amount the deceased had contributed to the support of plaintiff during the years he is alleged to have supported and maintained her. Bourke v. Butte El. P. Co., 82 Pac. 470; Railroad v. Farr, 56 Fed. 999.

Bresnehen & West and Scarritt, Scarritt, Jones & Miller for respondent.

(1) The case was one for a jury on defendant's negligence and the alleged contributory negligence of deceased. Railroad v. Boring, 51 Ga. 582; Burnside v. Railroad, 107 Minn. 401; Railroad v. Hague, 48 Neb. 97; Otto v. Railroad, 87 Neb. 503; Railroad v. Downing, 16 Tex. Civ. App. 643; Railroad v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Railroad v. McCormick, 124 Pa. 427; Watters v. Railroad, 239 Pa. 492; Railroad v. Eckford, 71 Tex. 274; McGee v. Railroad, 92 Mo. 208; MacDonald v. Transit Co., 108 Mo. App. 105; Zibbell v. So. Pac. Co., 160 Cal. 237; Young v. Railroad, 227 Mo. 307; Porter v. Stock Yards Co., 213 Mo. 372. (2)

Miller v. Railroad.

Plaintiff's instruction number 3 on the measure of damages was proper and has been approved by the Supreme Court of California. *Beeson v. Green Mountain M. Co.*, 57 Cal. 20; *Monroe v. Pacific Coast Co.*, 84 Cal. 515; *Lange v. Schoettler*, 115 Cal. 388; *Dyas v. So. Pac. Co.*, 140 Cal. 296; *Peters v. So. Pac. Co.*, 160 Cal. 48; *Waddell v. Railroad*, 213 Mo. 820. (3) The admission of evidence as to the health of plaintiff and that she had sustained a fractured hip was proper and competent. *Evarts v. Railroad*, 3 Cal. App. 712; *DeWitt v. Paper Co.*, 7 Cal. App. 774; *Simoneau v. Railroad*, 159 Cal. 494; *Cook v. Railroad*, 60 Cal. 604. (4) Evidence as to official positions held by deceased Miller was proper and competent. *Taylor v. Railroad*, 45 Cal. 323; *Beeson v. Green Mountain M. Co.*, 57 Cal. 20; *Lange v. Schoettler*, 115 Cal. 388. (5) Plaintiff's instruction number 1 submitting the case to the jury on negligence as alleged was proper. *Teale v. So. Pac.*, 20 Cal. App. 570; *Porter v. Stock Yards Co.*, 213 Mo. 372; *Young v. Railroad*, 227 Mo. 307. (6) The verdict is not excessive and can only be set aside, unless it clearly appears that the jury was actuated by passion and prejudice. *Ruppel v. United Railroads*, 82 Pac. 1073; *Bowen v. Sierra Lbr. Co.*, 3 Cal. App. 312; *Redfield v. Railroad*, 110 Cal. 287; *McGrory v. Railroad*, 22 Cal. App. 671; *Peters v. Southern Pac. Co.*, 160 Cal. 48; *Storrs v. Traction Co.*, 134 Cal. 91; *Evarts v. Railroad*, 3 Cal. App. 712.

BROWN, C.—On October 23, 1911, the plaintiff, together with a number of her sons and daughters, brothers and sisters of Frank S. Miller, deceased, filed this suit in the Linn Circuit Court, to recover damages for the negligent killing of the said Miller at Red Bluff, California, on March 23, 1911. The defendant answered, December 26, 1911, pleading, among other things, that by virtue of the provisions of the laws of California, where the alleged cause of action is charged

to have arisen, it is provided that where a party dies without wife or children his father and mother are the heirs next of kin who inherit his property under said laws, and that under said law the mother of said deceased is the only party entitled to sue, and that there was therefore a misjoinder of parties plaintiff.

The plaintiff acquiesced in this, and on June 5, 1912, dismissed as to all the brothers and sisters of deceased, and filed an amended petition with the mother as the only plaintiff. In this it was alleged, in substance, that the defendant was a railroad corporation incorporated under the laws of Kentucky, doing business in Missouri, and having and operating a railroad in California; that it was provided by statute in the last named State as follows: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just." [Cal. Code Civil Procedure (1906), sec. 377.]

That it was further provided by said statutes that the term person includes a corporation, and that if a decedent leaves no issue or husband or wife the estate goes to his mother and father in equal shares, and if either is dead then to the other.

The petition alleged that the plaintiff was the mother of the deceased, who was a bachelor, and that his father was dead.

It charged that on March 23, 1911, the said Frank S. Miller was a passenger on a freight train of the defendant, acting as caretaker of live stock being transported on said train; that while the train with the caboose attached was standing in defendant's switch

yards at Red Bluff, California, in a safe place on the level ground, he went into the caboose and there met the conductor or brakeman; "that while so inside the caboose with the conductor or brakeman the caboose and a portion of the train, through the agents and servants of the defendant, was switched or moved in the railroad yards of defendant at Red Bluff, and wrongfully, carelessly and negligently by defendant, through its agents and servants, left standing on a high, dangerous and unprotected trestle or bridge while it was dark and in the nighttime; that Frank S. Miller was unaware that the caboose had been moved after he had got onto the same, and left standing on a high and dangerous trestle or bridge of defendant which was unprotected by platform, banisters, guards or lights by the agents and servants of defendant, who wrongfully, carelessly, and negligently neglected and failed to inform said Frank S. Miller that the caboose was standing on the high, dangerous and unprotected trestle or bridge, and that it was dangerous to attempt to alight therefrom, although defendant and its agents and servants knew, or by the exercise of ordinary care, would have known, that Frank S. Miller was in said caboose and was in charge of live stock on said train and might, or would leave the caboose to attend to and care for the stock at any time; that Frank S. Miller, not having been warned of the position of the caboose and of the danger of alighting therefrom, was unfamiliar and unacquainted with the surrounding conditions of the track and yards of defendant at the place in question, all of which defendant's agents and servants knew, or had reason to be aware of, and on account of the darkness of the night, did not discover or ascertain that the caboose was standing on said trestle or bridge, or that it was dangerous to alight therefrom, and while the caboose was standing on said trestle or bridge at night, attempted, in the presence of the agents and servants of defendant, or with their knowledge, to leave or alight

from the caboose by means of the steps made at the rear end of said caboose for the purpose of ingress and egress, to attend to his duties as a caretaker of said stock; and when he stepped from the steps, which extended over the ties, track and side of said trestle or bridge, fell a distance of about fifty feet, striking the water, ground and rocks near or under the trestle or bridge, from which he received injuries, resulting in death in the course of a few hours through the wrongful acts or neglect, carelessness and negligence of the defendant and its servants and agents in moving the caboose and leaving it standing on the said trestle or bridge and in the neglecting and failing to warn him that the caboose was standing on the trestle or bridge and of the danger in attempting to alight therefrom and in neglecting and failing to warn him not to get off said caboose, when defendant, through its agents and servants saw, or by the exercise of due care could have seen, him in the act of leaving the caboose, and the peril thereof, in time to have prevented him from stepping from the caboose, and saved his life; and in neglecting and failing to construct and maintain said trestle or bridge with platforms, banisters or guards or lights thereon, as it was its duty to do in order to protect the safety and lives of persons."

It then alleged that "on account of the negligent, wrongful and careless acts and neglect of the defendant company, wholly unmindful of its duties to transport the deceased as a passenger on its said train in safety, the deceased came to his death, and that she has been deprived of the care, comfort, protection, society, maintenance and support of the deceased, who was her only support," and asks judgment for \$50,000 therefor.

The defendant answered with a general denial and special plea as follows:

"And for further defense defendant avers that under and by virtue of the laws of California, as de-

clared in *Nagle v. Railroad* 88 Cal. 86, it is held that 'contributory negligence is attributable to a passenger who, without any intimation from the train men that it is his stopping place, while the train is halting a moment upon the trestle, alights hurriedly in the dark, without carefully looking for a place to alight and sustains injury from falling into a canon beneath the trestle and this, notwithstanding other passengers believed that it was a regular station, and some of them were preparing to leave the train, and the plaintiff was told by one of the passengers to get out quick, as the train would only stop a moment,' and defendant avers that it was contributory negligence for the deceased to leave said car upon which he was riding and walk off in the dark not knowing anything about the surroundings and without any invitation from defendant or its employees to do so and defendant avers that whatever injuries, if any, deceased may have sustained at the time and place in question were occasioned by reason of his own careless and negligent acts in walking off said car in the dark which directly contributed to and brought about his alleged injuries.'

Issue was taken by reply. The cause came on for trial before the jury on said June 5, 1912, resulting in a verdict for plaintiff in the amount of \$18,000 upon which judgment was entered and from which this appeal was taken. The evidence developed the following facts.

The deceased, with the usual contract for transportation in such cases, was accompanying as caretaker a car containing a shipment of mules or jacks and bulls, shipped at Chillicothe, Missouri, and destined to Sisson, California, on defendant's railroad. At Grand Island, Nebraska, on the morning of March 16th, he was joined by Sherman Bailey, with a stallion destined for McArthur, California, on the same road. The horse was put in the same car with Miller's stock, and proceeded in charge of the latter as care-

taker and Bailey as his assistant, both the men riding in the car with the stock. At Ogden, Utah, the car was transferred to the defendant's railroad, over which it proceeded to Roseville, California, where it was attached to defendant's freight train going north through Red Bluff. At Roseville the train took another car of stock destined to a point in Oregon over the same railroad, in charge of James Willson and Joseph Pressler, who rode in the caboose. This train consisted of sixty or seventy cars when it left Roseville, and seems to have had fifty odd when it arrived at Red Bluff, a city of about four thousand inhabitants and a division station for two lines of the defendant's railroad.

It was the duty of the deceased to care for the stock in his car, feeding and watering it, getting the animals up should they fall down, and doing everything necessary for their comfort and preservation from injury. The town, or inhabited portion of it, lies on the north side of Red Creek, over which the defendant's road enters it upon a steel bridge consisting of three spans aggregating two hundred and twenty feet in length, of the deck girder variety, that is to say, the track structure was above the girders which supported it, and consisted of ties on which rails were laid. These extended only part way across the structure. There was no planking or railing of any kind to prevent a person from falling through it to the creek bed about fifty feet below. The yard limits of Red Bluff included this bridge, north of which its trackage lay. The points of the first switch were about six hundred feet north of the north end of the bridge and led out into three side tracks, each about a mile long, west of the main track. There were also two other side tracks east of the main track. The train upon which the deceased was riding came in from the south a little after seven o'clock over the bridge, took the switch into the first siding west of the main track, and passed on until it was clear of the switch leading to the side tracks

further west. Its motive power was insufficient for the remainder of the trip and it was made up with a helper. For this purpose the steel-frame cars were to be left in front of the extra locomotive which was to be placed in the train at that point, while the weaker wooden cars were to be placed behind it. The car in which the deceased was riding with his stock was the last freight car in the train, and next to the caboose in the rear. It was an Arms Palace stock car, with side doors about four feet wide.

When the train had been placed upon the side track the deceased and Mr. Bailey left the car, and went to the depot about a half mile north of the bridge, and from there found an eating house where they took supper. On returning to their car they found it about where they had left it, north of the switch. One of the mules was down, the other one having pushed the partition between them against him. They got him up, put the partition in its place, and looked for something to fasten it to the floor. Just as deceased was leaving the car on that errand, a trainman came past and suggested that if he would go into the caboose he could get what he wanted. The time was short until the train was due to move, and Mr. Miller and the trainman went up the steps to the front door of the caboose and found it locked. They then went to the rear door which was unlocked, and Mr. Miller went in, where he found Mr. Phillpot, the brakeman who was getting the caboose ready for the trip. To do this it was necessary that the markers or rear lights of the train should be put out, that all the lamps and lanterns should be lighted, and that the indicators, which were the figures representing the numbers of the train and caboose, should be put up in the rear of the cupola. Mr. Miller came in the car and explained that his stock had broken a partition and he wanted a block that he could nail down to the floor to hold it so that the animals could not crowd it over. About this time Mr. Phillpot became

aware that the switch engine had coupled to the car and that it was moving; and when it had stopped he came down out of the cupola and got from the oil cupboard what Mr. Miller wanted and gave it to him, and the latter went out the rear door at which he had come in. All this did not take more than three or four minutes, and Mr. Phillpot did not know that the car had been moved onto the bridge. When Mr. Miller went out, the switch engine had been uncoupled and moved back from the car, so that Mr. Hook, a switchman who stood on the footboard, was about ten feet away from the caboose, while the engineer, who was in the cab on the east side of the engine, was the length of the boiler away. The steam was escaping from the boiler with the usual noise and the injector was working.

Mr. Bailey had become interested in the continued absence of Mr. Miller, and stood in the east door of the Arms car, looking toward the caboose, and waiting for him to appear. He says that the head light of the switch engine over the front end of the boiler, shining along the side of the caboose, had the appearance of a path, but he could not see the bridge. As he stood in the door he saw Mr. Miller leave the bottom step of the caboose. Just then he heard the first warning from the engine, and started to get down, when some one called to him that they were on a trestle. He put his lantern down beneath the sill and saw the bridge for the first time. He heard no call from the engine until he saw Mr. Miller leaving the step.

A few seconds after Mr. Miller stepped out, Mr. Phillpot heard the switch engine give one blast of the whistle, which was unusual, and he walked to the back end of the caboose to see what was the matter. The moment he stepped out they began to holler at him. Some one said, "Don't step off." He testified: "Of course I stopped, and he said, 'Who fell off the caboose?' and I said, 'No one,' and he said, 'Yes, a

man just fell off the caboose.' I turned around and looked back in the caboose and saw that the stock man was gone." This was the first intimation Mr. Phillpot had that they were on the bridge. He said that although he had been in the same movement a dozen times he "never got caught out there before." Nor did he know whether they had ever moved the caboose upon the trestle.

A few days before the accident the defendant had begun to prepare the bridge for planking and some of the floor timbers had already been distributed along the stringers. The floor was afterward finished, and a rail put up on the outside.

Mr. Phillpot testified as follows: "My duties as brakeman—we all know what it is—is to protect at all times the train, and if anything is going wrong to prevent any damage, anything that might occur, and look after the train just the same as a man would look after his stock." He also testified as follows:

"Q. Of course, Mr. Phillpot, if you had known the caboose was standing on the trestle it would have been your duty to inform Mr. Miller of that fact, would it not? A. Yes, if I had known the caboose was on the trestle I would have told them; yes.

"Q. Why would you have informed them? A. Well, it is second nature of a man to protect another if he can.

"Q. Well, you would have informed him of that fact because you knew that the trestle did not have any banisters and it was dangerous to get off? A. Yes; and if I knew it had been stopping there, I most certainly would have told them.

"Q. That would have been a part of your duty to have told him there, under the circumstances, knowing what you did about the trestle? A. Yes, sir, that was part of my duty I suppose."

The plaintiff proved that the deceased was a bachelor forty-seven years old at the time of his

death, and at that time resided with his mother at the family home in Chillicothe, Missouri, where he had been the head of the family and supported her entirely from his own income and cared for her since the death of his father in September, 1908. None of her other children lived with her. He was domestic in his habits and spent all his evenings with her. He was a lawyer in active practice, earning from \$2500 to \$3000 per year. After his death the plaintiff went to live with a daughter, but the old home appealed to her, and after five or six months she came back to it and has lived there alone ever since.

Mrs. Miller testified, against the objection of defendant, that the Christmas after her husband's death she fell and broke her hip; that she was in bed eight or ten weeks and had been a cripple ever since, using crutches, and that deceased took care of her the most of the time. The admission of this evidence is assigned for error. In other respects her health was good considering her age. She also proved, against defendant's objection, that deceased had occupied the office of clerk and mayor of his city, prosecuting attorney and probate judge of his county, and chairman of the Republican central committee of his county and Congressional district. This is also assigned for error. Further reference will be made to the evidence as necessary.

After the evidence was all in the defendant asked a peremptory instruction for a verdict, which was refused and exception taken. The court at the request of plaintiff instructed the jury as follows:

"1. The court instructs the jury that, if they believe from the evidence that Mary E. Miller is the mother of Frank S. Miller, and that he was on the 23rd day of March, 1911, single and unmarried, had no children, and his father was dead and that, on or about the 23rd day of March, 1911, Frank S. Miller was, with the consent of defendant, on a freight train of de-

fendant, acting as a caretaker of live stock being transported on said train, and while the caboose was attached to the train standing in the switch yards of defendant in Red Bluff, California, in a safe place and on level ground, entered the caboose and remained there in the presence of the agent of defendant in charge of the operation thereof, and while so inside the caboose, it and a portion of the train was switched and moved in the railroad yards of defendant at Red Bluff, by defendant by its agents and servants, and was by them left standing on a high and unprotected trestle or bridge with no light thereon, and while it was dark and in the nighttime, and that Frank S. Miller was unaware that the caboose had been moved and left standing on said trestle or bridge after he got into the same, and that defendant, its agents and servants, knew, or, by the exercise of ordinary care, could have known that Frank S. Miller was in said caboose and was in charge of live stock on said train, and might reasonably leave the caboose to attend to and care for the live stock at any time, and that Frank S. Miller was unfamiliar and unacquainted with the surrounding conditions with reference to the location of said caboose on said trestle, and, on account of the darkness, did not discover or ascertain that the caboose was standing on said trestle or bridge, or that it was dangerous to alight therefrom, and that the agents and servants of defendant in charge of said caboose and train were present when said Frank S. Miller attempted to leave said caboose, and did not inform him that the caboose was standing on said trestle or bridge, and of the danger in attempting to alight therefrom, and he did not receive any warning or notice, and, under all the circumstances, you believe they were negligent in not so informing him, and that the said Frank S. Miller, while attempting to leave or alight from the caboose by means of the steps, made at the rear end of said

caboose for the purpose of ingress and egress, to attend to his duties as a caretaker of said stock, stepped from the steps thereof, and that they extended over the ties and sides of said trestle or bridge, and that, by reason thereof, he fell a distance of about forty feet, striking the water, ground and rock under the trestle or bridge, from which he received injuries resulting in death in the course of a few hours, then you may find for the plaintiff, provided, however, you further find that the said Frank S. Miller at the time herein referred to, while leaving the caboose, was exercising ordinary care under all the circumstances for his own safety."

"3. The court instructs the jury that, if their verdict is in favor of the plaintiff, Mary E. Miller, such damages may be given by them to plaintiff as, under all the circumstances of the case as disclosed by the evidence, may be just. And, in determining the amount of such damages, if any, you may take into consideration the pecuniary loss, if any, suffered by this plaintiff in the death of Frank S. Miller, by being deprived of his support, if any, and the pecuniary loss, if any, sustained by her in the loss of his society, comfort and protection, if any, in all not to exceed the sum sued for, \$50,000."

Error is assigned to the giving of both these instructions. The defendant asked and the court gave a number of instructions telling the jury that there was no evidence showing that defendant's employees invited Mr. Miller, either expressly or by implication, to leave the caboose at the time and place he attempted to do so, or led him to believe that the caboose was in a safe place for him to alight; and that if he was warned that the caboose had been moved, and not to leave the same, prior to stepping from the last step of the caboose and in time to save himself from falling, their verdict must be for the defendant. It also asked and the court gave the following instruction:

"8. The court instructs the jury that it was the law of California at the time of the alleged injury to the deceased, Frank S. Miller, that a person traveling on a freight train as a passenger was guilty of contributory negligence, who, without any intimation from the trainmen in charge of the train upon which such passenger was riding, that such passenger was at a depot where passengers usually alight, while the train was halted a short time upon a trestle, to hurriedly leave said train, in the dark, not knowing where he was stepping and without carefully looking where he was stepping.

"You are therefore instructed that if you find and believe from the evidence in this case that at said time and place complained of, the deceased, Frank Miller, was riding on a freight train of defendant, and while at said Red Bluff, California, the said Frank Miller got upon the caboose of defendant's train to procure a board to fix up a partition in the car in which he was riding with some stock, and that while in said caboose the same was switched onto the main line of defendant's road over the trestle described in evidence; and that said Frank Miller knew, or by the exercise of reasonable care would have known, that said caboose was being moved after he went upon the same, and while said caboose was standing upon said trestle, said Miller left same, in the darkness, without any intimation from the train crew that said train was at a place provided for passengers leaving said car, or that said place was a safe place to alight from said caboose and hurriedly attempted to alight from said car in the dark and not knowing where he was stepping and without using due care to ascertain his surroundings, and fell and was injured thereby, then you are instructed plaintiff cannot recover in this action, and you will return a verdict for defendant."

The court refused an instruction telling the jury that defendant had the right to make any defense

he had by virtue of the laws of California; that said right was a property right protected by the Fourteenth Amendment of the Constitution, and that under the law announced in the case of Nagle v. Railroad, 88 Cal. 86, plaintiff was guilty of contributory negligence in walking off the caboose without knowing where he was going and without looking where he was stepping, and that they should therefore return a verdict for the defendant. It also refused to instruct as follows:

"13. The court instructs the jury that if you should find the issues for plaintiff under the instructions herein you cannot award her any damages for mental pain or suffering by reason of the death of the deceased, Frank S. Miller, but you will only allow that amount as she would have received from said Frank S. Miller, deceased, for the time of her expectancy, and you are further instructed that the years of expectancy do not exceed six years."

I. This is an action under a California statute, brought against defendant by the mother of Frank S. Miller, to recover damages for the death of Mr. Miller, which is alleged to have been caused by the wrongful act of the defendant in that State. It is admitted upon the record that the plaintiff, as his sole heir under the laws of California, is the proper party to sue, and is the person to whom any damage recovered will accrue, so that that question need not be further considered. The deceased was killed by stepping off the steps of the caboose attached to a freight train upon which he was a passenger through an undecked bridge approximately fifty feet high, upon which the car was standing at the time. The suit is founded upon the theory, which is well pleaded in the petition, that under all the circumstances the defendant was guilty of negligence in placing the car, in which Mr. Miller was riding at the time, upon the bridge without warning to him. If this is

Allighting
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Law.

true, the negligence was the proximate cause of his death, unless he was negligent in getting off the car as he did, so that his own negligence contributed directly to his injury. Accepting the burden imposed in this jurisdiction, by the laws of which all matters of practice are governed and must be determined, the defendant pleads in its answer that under the law of California as construed by the highest court of that State in *Nagle v. California Southern Railroad Company*, 88 Cal. 86, it was negligence for the defendant to get off the car at that particular time and place. This question of negligence of the respective parties presents the principal issue for our consideration. Examining the authority pleaded, we find that the question considered by the California court related solely to the duty of the passenger in determining whether or not he had arrived at the station at which he was to alight. This question is so different from the one raised by the facts in this case that it will not be necessary to make further reference to the authority. Upon examination of all the California cases cited to us in argument we do not find the interpretation of the law applicable to these facts as held by the courts of California to be different from that applicable in this and most other American States.

II. Referring first to the question of defendant's negligence charged in the petition, we cannot do better than to point to our own definition of "due care" and "negligence" in *Dean v. Railroad*, 199 Mo. 386, 408, where we said, in substance, that due care is a care adjusting itself to the circumstances of the case, and that negligence is simply the absence of such care. The circumstances of this case do not involve the operation of an ordinary train carrying passengers whom it receives and discharges at the stations along its line. There is nothing in this evidence to indicate that this train

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Caboose:
Contributory
Negligence.

ever did or was permitted to carry passengers in that sense; or that it ever stopped at stations to let persons on or off. We simply know from the evidence that it was a freight train carrying stock, upon which the owners of the animals or their representatives or servants rode upon a contract which had been exhibited as transportation in this case, and that while it was the duty of the defendant to carry the animals, it was both the privilege and duty of the caretaker accompanying them to care for them at all times, to make them comfortable, and to preserve them from injury; and that wherever the train should stop in the performance of the regular work incident to its operation, he was expected to descend from the car if necessary and perform these duties. In this case the train was in a terminal yard of defendant where it was to remain more than an hour, which would presumably be available for this work. It arrived after dark. The deceased was riding in a stock car. The bridge construction did not extend above the track and there is no evidence whatever, either by statement of witness or necessary inference, that he knew of its existence. It might be said that the noise of this train in passing over the bridge would indicate its existence, even to the inexperienced; but at the time of the accident the same cars were backed onto and nearly across it without indicating to Mr. Phillpot, a brakeman of several years' experience, that the car in which he was riding was not on solid ground. About five minutes before the accident, the time being indicated by the statement of Mr. Phillpot that he was from three to four minutes in the cupola of the car, the deceased had been advised by one of the trainmen to pass from his own car to the adjoining caboose from which he stepped to his death. Under all the circumstances of this case, the place for the deceased to alight from the car was anywhere within the limits of the yard, unless some local element of unsuitability should appear.

The circumstances under which Mr. Miller did alight with the unfortunate result out of which this cause has grown, are plainly and clearly in evidence. The train was getting ready to start; the extra engine had been put in its place in the middle, and the switch engine that had given it the fifteen or twenty rear cars of which this caboose was the last, had released it, so that it was ready to go on the road. The lights which were to protect it from the rear had been placed in position by Mr. Phillpot. Mr. Miller was in a hurry to get his partition nailed down before it should start. He waited patiently in the caboose three or four minutes while Mr. Phillpot was putting up his indicators and lighting his lamps and lanterns so that he could hand him his block. As soon as he had done this Mr. Miller took it, and turned and opened the same door at which he came in less than five minutes before, went out on the platform and confronted the big acetylene head light on the front of the boiler within ten feet of his face. Forty feet further to the front Mr. Bailey stood leaning out of the door watching for him. While he also was over the bridge he could not see it, but the light made it look like a path along the side of the car. Mr. Miller in his hurry started for the west steps, but correcting himself he turned to the east side and started down. Mr. Bailey saw him step off and disappear beneath the cone of rays from the head light. Mr. Hook stood under the head light within ten feet of him and as he stepped off he was horrified and shouted to him not to do it. We will presume that during all this time Mr. Miller was not attempting to commit suicide, but had proper regard for his own safety, using reasonable care under the circumstances as they appeared to him, in all his movements. Just as he left the caboose Mr. Bailey heard a shout from the engine, and started to get out himself, when the engineer or Mr. Hook called to him to look out, that they were on the trestle. He got back in the car, got his

lantern and put it under the sill of the car, and saw the trestle for the first time.

Mr. Phillpot, the brakeman in the caboose, was equally ignorant. He heard an unusual whistle from the engine and started for the rear platform of the caboose. When he arrived there they called to him from the engine not to step off, and told him that a man had just fallen off. He turned away and looked in the car and saw that Mr. Miller was gone and the engine men had gone running down the bank with the lantern to pick him up. The information he received from the engine was his first knowledge that they were on the bridge. He testified that had he known, it would have been his duty to notify Mr. Miller and the other persons in the car of the fact, and that he certainly would have done it.

Although two men who were in the caboose at the time testified that the fact that they were on the bridge had been spoken of in the caboose in Mr. Miller's presence, neither of them said that he had given any indication that he heard it, and their testimony in other respects was so at variance with physical facts that it is not calculated to suggest much doubt as to the accuracy of the statement made by the brakeman. We are driven to the conclusion that it had not occurred to either Mr. Miller, Mr. Phillpot or Mr. Bailey that the caboose did not still stand in the yard where it was perfectly easy and safe to get off; and that in the darkness, as modified by the glare of the headlight it was impossible for either to see the bridge either from the platform or steps of the caboose or from the door of the stock car where Mr. Bailey was standing watching for his companion. It is certain that the appearances were such that Mr. Miller stepped down to his death without hesitation, and that Mr. Bailey and Mr. Phillpot would have unhesitatingly done the same thing had they not been warned by Mr. Hook and the engineer, the first named of whom stood

under the headlight with his feet within a few inches of the ties and the latter leaning from his cab behind the headlight. Whatever we may think about the optical conditions, these men were all there, and they testified as to how it looked to them, as well as to what was said and when it was said. Mr. Miller testified to the same effect with his life and the jury found from this testimony that he acted as a man of ordinary prudence would have acted under the same circumstances in leaving the car. This question was submitted in language selected with the most delicate skill by the defendant, and it is not our province to question their judgment.

III. This leads us to the question whether under the facts stated in the last paragraph the defendant exercised that high degree of care that the law exacts from the carrier for the protection of the lives of its passengers. It seems to us that the question answers itself in the negative. For its own profit the defendant requires shippers of stock and their caretakers, strangers to its road and property, to care for their shipments in transit, and to get on and off the cars whenever and wherever necessary for that purpose without reference to the stations used for receiving and discharging other passengers. This service may be performed in the nighttime as well as by day, and the inducement is not so much in the nature of an invitation as of a command. It is a duty expressed or implied by the contract under which they are transported, and requires at its hands a care for their safety as broad as the peculiar conditions attending it. To say that a danger consisting of an open bridge over a rocky canyon forming a part of the yard in which these services are performed, unsupplemented with a warning of the danger, is consistent with such care is, to put it mildly, illogical. Mr. Phillpot, whose experience qualified him to testify on

that subject, is to be believed when he said that had he known where the car was it would have been his duty to notify Mr. Miller, and the law cordially endorses the logic of his conclusion. If this were true it was the duty of those who knew, and who managed the engine by which the danger was created, to tell him, so that he could perform his duty.

The negligence of defendant with reference to this situation is fully and properly pleaded in the petition and we cannot interfere with the finding of the jury in that respect.

IV. This leaves us the question relating to damages. The instruction authorizes the jury in the words of the statute, should they find for the plaintiff, to give her such damages "as, under the circumstances of the case as disclosed by the evidence, may be just." They were further directed that in determining the amount of such damages they might take into consideration the pecuniary loss, if any, suffered by plaintiff in the death of her son by being deprived of his support, if any, and the pecuniary loss, if any, sustained by the loss of his society, comfort and protection, if any. The defendant urges that the instruction is erroneous in including the two elements of damages last mentioned.

While it may be that the Supreme Court of California has not always been perfectly plain in its language as to the elements of damage contemplated by the law under which this suit is brought, its general course has resulted in the establishment of rules which leave but little difficulty in the consideration of this instruction. The statute gives the right of action to the *heirs* of the deceased, and provides that in every such action "such damages may be given as under the circumstances of the case may be just." In connection with the wide latitude given the jury in this respect, which in terms makes their sense of justice the only limita-

tion upon their judgment as to the amount of damages, we note the fact that the action is to the "heirs." It was no doubt intended that an action should lie in favor of the heir in all cases, and this necessarily implies that in the assessment of damages the right or expectation of the plaintiff as *heir* should be an element; but the appeal to the sense of justice of the jury indicates that something more than this was contemplated and that to the extent of the class included by the Legislature it was intended to place those benefited by the life of the deceased as nearly in the condition they would be had his life continued as could be done by *pecuniary* compensation for their loss. This view of the question received early consideration from the Supreme Court of California in *Beeson v. Green Mountain Gold Mining Company*, 57 Cal. 20, in which an instruction was considered and upheld which is substantially like the one given in this case. It told the jury, as does this one, that "such damages may be given as under all the circumstances of the case may be just," and added that, in determining the amount, they may take into consideration the pecuniary loss, if any, suffered by the plaintiff in the death of the deceased by being deprived of his support; also the relations existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society. The case received a most thorough consideration by that court, which said in substance that while it was true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; in another sense, it may not only be possible, but eminently fitting, that a loss from severing social relations, or from the deprivation of society, might be measured, or at least considered, from a pecuniary standpoint. This idea has its counterpart in cases of purely physical injuries, for who would say that simple disfigurement should not be the subject of pecuniary compensation because

it might not affect the earning capacity of the sufferer? The California court went on to say that in its opinion the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of "all the circumstances of the case" for the jury to take into consideration in estimating what damages would be just from a pecuniary point of view.

In *Cook v. Railroad*, 60 Cal. l. c. 609, the same question arose. The plaintiff's wife was allowed to testify that it was the usual custom of deceased to be at home after business hours; that they had lived a happy married life, and that for eight years prior to his death she had been an invalid during which he had been very kind and attentive, and that she was dependent upon him. The daughter was allowed to testify that he was a kind father; that the social and domestic relations as to the family on his part were happy; and that he was kind and loving to the plaintiff. The court said: "The first and second points above stated are fully covered by section 377, C. C. P. — 'Such damages may be given as under all the circumstances of the case may be just'—and by the decision of this court in *Beeson v. G. & S. Co.*, 57 Cal. 20. We are asked to review that case, and change or modify the views therein expressed. We decline to accede to that request; on the contrary, we here follow them." In *Morgan v. Southern Pacific Company*, 95 Cal. 510, 517, the court reversed a judgment for \$20,000 for the death of a two-year old child on the ground that the court charged the jury that it was not limited by the actual pecuniary injury sustained by the mother by reason of the death of the child, at the same time quoting with approval from the *Beeson* case as follows: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; . . . but in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be meas-

ured, or at least considered, from a pecuniary standpoint."

In *Pepper v. Southern Pacific Co.*, 105 Cal. 389, a suit by a father for damages for the death of a son twenty-five years old residing apart from the plaintiff, the court disapproved an instruction which told the jury that in assessing the damages they may *in addition to the pecuniary loss and injury sustained* take into consideration the loss, if any, sustained by the plaintiff in being deprived of the comfort, society and protection of the deceased by reason of his death. In doing so it said: "It may well be doubted whether the facts of this case justified any, even the most guarded, instruction in relation to compensation for the deprivation of the comfort, society and protection of the deceased." In *Lange v. Schoettler*, 115 Cal. 388, the same court, in holding that the ordinary rule relating to recovery of exemplary damages did not apply to cases prosecuted under this statute, said: "It is true, in the case of a mother or a wife the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or husband, but it has been always held that this was in strict accordance with the rule that only the pecuniary value of the life to the relatives could be recovered. The probable comfort, society and protection of the deceased had some pecuniary value."

In *Green v. Southern Pacific Co.*, 122 Cal. 563, 567, the court, following *Harrison v. Railway*, 116 Cal. 156, 169, said: " 'While the jury have the right in such a case to consider the loss suffered by the widow in being deprived of the comfort, society and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The form of the instruction here was calculated to lead the jury into the error of supposing that they could on this account add something more than pecuniary loss.' " In *Skelton v. Lumber Co.*, 140 Cal. 507, 512,

the court, in sustaining a judgment for \$18,000 in favor of the widow and minor children for the death of the husband and father, a workman in defendant's mill, said: "The proof of the value of the deceased as a wage-earner might not alone justify the amount awarded; but there were other elements of damage to be considered by the jury, which they alone were competent to consider." In *Sneed v. Gas & Electric Co.*, 149 Cal. 704, 710, the court, while holding it to be definitely settled that under this statute the damages to be recovered are always limited to the pecuniary loss suffered by the heirs, said: "We think it may be further said that this pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it would be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only." In *Peters v. Southern Pacific Co.*, 160 Cal. 48, 69, the court citing numerous California cases said: "It is too well settled in this State to be now open to question that in actions of this character the plaintiff is entitled to recover for all pecuniary loss sustained, and as elements in determining that pecuniary loss the jury are to take into consideration the loss which the wife and children have sustained through being deprived of the comfort, society, support and protection of the deceased by the wrongful act of the defendant." The last case to which our attention has been directed is *Crabbe v. Gold Mining Co.*, 168 Cal. 500, decided in 1914. It was a suit by the administrator of the deceased, a miner killed in working the mines of defendant, brought under this statute. There was a judgment for \$20,000. The judgment was affirmed, the court saying: "The jury were entitled to take into con-

sideration the loss of society, comfort and care suffered by the surviving children on account of the death of their father. [Dyas v. Southern Pacific Co., 140 Cal. l. c. 308.] It may not be said that under the facts and circumstances of this case the award of the jury was excessive.”

The cases we have cited fully cover the doctrine of the highest judicial court of the State of California with reference to the assessment of damages under the statute upon which this suit is brought. Our references have necessarily been incomplete, but they cover the entire period of the history of this act in its present form, down to the present time, and firmly establish the rule to be that, while this statute authorizes in terms the jury to give such damages as under all the circumstances may be just, they are confined to pecuniary damages alone; that these, in turn, are not confined to compensation for the destruction of legal rights, but include those moral rights lying in reasonable anticipation as well as in present enjoyment, in favor of the class made by the act its beneficiaries as heirs to the probable prospective accumulations of the deceased from his personal exertion. Damages for the destruction of a home of which the beneficiary has the moral right to expect the continuance, including the benefits reasonably expected from the kindly relations of the parties and the peculiar disposition of the deceased toward his family, considered in connection with their physical condition and needs; and the loss to the beneficiary of the society, comfort and care of deceased, is also included to the extent of their pecuniary value. They are founded upon the theory that the wrongdoer ought not to be permitted to destroy the home or to take away the support, society, comfort and care which one enjoys, and of which he has a moral right to expect the continuance, and escape liability to the extent of purely pecuniary compensation for the wrong, on the ground that these things, however important they

may be to the life and future of the sufferer, are too intangible to be cognized by the law.

Although the instructions complained of are perfectly consistent with these views, and fully authorized by the evidence, we are constrained by the amount of the verdict to believe that the jury, in its consideration of these questions placed an excessive value on some of these legitimate elements of damage. We will therefore in accordance with our settled practice in cases calling for such disposition, affirm the judgment upon condition that the plaintiff will, within ten days from this date, remit from its amount the sum of eight thousand dollars as of the date of its entry; otherwise the judgment will stand reversed, and the cause remanded for a new trial. *Railey, C.*, concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur.

IN THE MATTER OF PUBLISHING THE DOCKET IN A LOCAL NEWSPAPER.

In Banc, March 28, 1913. Certified to Reporter for Publication
July 16, 1915.

SUPREME COURT: Publication of Docket in Newspaper. The publication of the docket of the Supreme Court or of any division thereof, in a local newspaper or any newspaper, at public expense, is not required by the statute. The amendment of the statute in 1889 (Sec. 2079, R. S. 1909) took away the necessity for such publication. It is, therefore, ordered that the clerk shall not hereafter cause the docket to be published in a newspaper at public expense.

FARIS, J.—Since the administrative order, made by a majority of the Court In Banc, touching the matter in the caption, may be said with historical truth, to

overrule a former holding of this court on this question, a decent respect for the diverse views entertained by other members of the court (and mayhap by the public likewise) requires a setting forth of the points which induced the conclusions reached.

At the threshold we are met by the question as to whether the language of the statute is clearly mandatory and requires that the docket of the Supreme Court be "*published in a newspaper*," which newspaper is printed in Cole County. If the language does so require, we must needs acquiesce, and further comment is "weary, stale, flat and unprofitable." If the language to which we shall presently call attention be directory only, then we may exercise a sound discretion, influenced by an expediency which fits the means to the end. In thus asserting we bear in mind the certainly elastic and perhaps inherent power of the court to make rules inuring toward orderliness and expedition of business. The section under discussion is as follows:

"Sec. 2079. It shall be the duty of the judges of the Supreme Court and Courts of Appeals, at the end of each term of said courts, to direct the number of cases to be docketed by the clerks for the next succeeding terms of the courts, and the clerks shall docket all cases from the same judicial circuit in succession, in the order of the circuits, setting not more than ten cases for each day, and a copy of the docket shall be printed in the county wherein such Supreme Court and Courts of Appeals shall be held, at least forty days before the commencement of the term: *Provided*, that if for any cause any cases are not reached for hearing at the first term at which they are docketed, then it shall be the duty of the clerk to place all cases undisposed of at any term first upon the docket of the succeeding term; and *provided further*, that if any case has, or shall hereafter, come before any of said courts, by ap-

peal or writ of error, and has been or shall be reversed and remanded, and said case shall again come before any of said courts for further trial, it shall be the duty of the clerk of said court to docket said case for trial among the first cases for trial at the next term of the court, if it reaches the court in time, and if not it shall be docketed at the next term of such court, and it shall be the duty of the court to hear and determine the case at the same term it is docketed, unless continued for cause."

The only words of the above section which concern us, because they are the only words having any reference to the matter in hand, are: "*A copy of the docket shall be printed in the county wherein such Supreme Court . . . is held.*" If we can read into this section by construction the additional requirement that such printing shall be "in a newspaper published" in the county wherein the Supreme Court is held, then such publication must be so had. We must give to the word "print" as used by the law-making power, its ordinary meaning, when used as a verb (and it so occurs in this statute), which is "to make an impression with inked type." The word "publish" ordinarily means "to make public." A book, a paper or a pamphlet might be "printed" but never "published." A paper might be "printed" in St. Louis and "published" in Chariton County. [E. g. *vide*, *Julian v. Kansas City Star*, 209 Mo. 35; *Cook v. Globe Printing Co.*, 227 Mo. 471.] We hold, therefore, that upon its face the statutory language is not clearly mandatory in requiring publication of our docket to be made in any newspaper.

But we need not engage in such analytical splitting of hairs. We need only consider the legislative history of the governing words of the section, *supra*. The requirement as to the printing of the docket came into the statute by an act approved February 28, 1871 (Laws 1871, sec. 21, p. 48), and was couched in the fol-

lowing words: "*A copy of the docket shall be printed in some newspaper printed in the county wherein such Supreme Court shall be held.*" The wisdom of this provision at that time is not difficult to see, when we bear in mind that there were then held six terms of court each year; that such terms were held in St. Louis, Jefferson City and St. Joseph. The March and October terms were held in St. Louis; the January and July terms at Jefferson City; the February and August terms at St. Joseph. The court was ambulatory; the mountain came to Mohammed. The court was carried to the bar.

By the Constitution of 1875 the place of sitting of the Supreme Court was permanently fixed at Jefferson City. So, as we might expect, the language under discussion was changed in 1877 to read thus: "*A copy of the docket shall be printed in the county wherein such Supreme Court shall be held at least ten days,*" etc. [Laws 1877, p. 232.]

The language used in the Act of 1877, *supra*, and last above quoted, was carried, without change, into the revision of 1879. [Sec. 3763, R. S. 1879.]

In 1883, the above section was amended to read: "*The clerk shall cause a copy of the docket to be printed in some newspaper published in the county wherein such Supreme Court shall be held, at least thirty-five days before the commencement of said term.*" [Laws 1883, p. 123.]

The above language is clear and needs no comment. It will be noted also that the period of publication was "thirty-five" days, whereas before it had been but ten days.

In 1889 the entire Practice Act was revised and re-enacted. As re-enacted, the provision under discussion, being section 3763, Revised Statutes 1879, was changed to read as follows: "*And a copy of the docket shall be printed in the county wherein such Supreme Court and Courts of Appeals shall be held at*

least forty days before the commencement of the term." [Laws 1889, p. 208.] This language was carried from the revised and amended act, above quoted and cited, into the Revised Statutes of 1889, as section 2293, and this language has come down to us unchanged through the revisions of 1899 (Sec. 855, R. S. 1899), and 1909 (Sec. 2079, R. S. 1909), and now occurs in the section last cited, just as it was re-enacted in 1889.

From this it is clear that the Legislature eliminated the requirement as to publication in a newspaper, and that it did so with premeditation. This is clear from the fact that in the revised bill as set out in the Session Laws of 1889, the amendment of 1883 (requiring and directing publication in a newspaper), is referred to in the parenthetical footnote. Furthermore, the period of publication is changed from thirty-five days to forty days. It follows that the rules of statutory construction will not allow us to say that the Legislature did not intend to repeal the requirement of publication in a newspaper.

Another consideration, in its logic equally convincing and decisive, is the fact that by section 2079 is conferred the sole authority for this court, through its clerk, to print and distribute to the bar the bound pamphlet dockets. This being so, has this court, or the clerk of this court, under the provisions of section 2079, power *both* to *publish* the docket of this court in a newspaper printed in Cole County, and to *print* paper-bound pamphlet dockets for the benefit of and to be sent out to counsel over the State having causes set for trial in the court. Unless the power comes from this section we are then clearly lacking in any legal authority under the statute quoted, to either print in a pamphlet, or publish in a newspaper. We may do one, but not both. The authority specifically conferred (history of the legislative changes being kept in mind, and expediency and publicity considered), would then

In re Publishing Docket.

seem to be to print in a pamphlet the docket of the court, and to *publish* such docket in every county and place where interested counsel reside.

The administrative rule heretofore adopted, since it entails upon the State an almost useless expense of some \$800 a year, and requires to uphold it a construction of the statute which is wrong, ought to be followed no longer. Ordered therefore that the publication of the docket of this court be not hereafter published in any newspaper in Cole county. *Lamm, C. J.*, and *Brown and Walker, JJ.*, concur; *Woodson, J.*, dissents in opinion filed; *Graves, J.*, dissents in an opinion filed in which *Bond, J.*, concurs.

GRAVES, J.—I dissent from the opinion of my learned and esteemed brother in this matter. The question arose upon the business side of our duties. The particular occasion is immaterial. Whilst, as I have stated, and as stated by the principal opinion, the matter was one more particularly addressed to the business side of the court, and not especially to the judicial side, yet in determining our duties it became necessary to construe a statute of this State. Such construction bespeaks judicial action, and but for this my dissent to the order made would be a silent rather than a written dissent. By our order we have said that under section 2079, Revised Statutes 1909, the clerk has no right to have our docket published in a Cole County paper, or any other paper. The majority opinion of Judge FARIS so holds. To this order and this opinion I dissent.

I do not place this dissent upon the absolute necessity of such a publication, nor specially upon the advisability of the same, but I do place it upon what I deem a plain statutory duty. If the statute, set out in my brother's opinion, means that our clerk should publish our docket in a paper in the county where the court is held, then it should be done, because it is

mandatory in terms. And it should be done notwithstanding our view of the necessity of publication. That question was one for the Legislature and not for this court, and much might be said upon both sides of the question. With this view of our duties and the Legislature's duties, we shall not discuss the question of necessity.

As indicated by the principal opinion, for years we have had upon our books a statute somewhat similar in import. It is true that in the revision of 1889 the verbiage was changed and the meaning was clouded to a certain extent, and this cloud is the thing which now gives rise to the difference of opinion among the members of this court. To start with, we can safely agree that from 1889 to this date the statute has remained the same—a period of twenty-three years. During this period it has been construed by the officers upon whom the duty devolved to construe it. It has been construed (1) by the clerk of this court, (2) by this court as the auditor of its own bills, and (3) by the disbursing officers of the State. All have said the statute means the publication of the docket in some newspaper in Cole County, such as the clerk of the court may direct. The clerk has so construed it by making such publication. The court has at least tacitly construed it by auditing such bills, and the disbursing officers of the State have so construed it by auditing and paying such bills—and this for twenty-three years. Not only so, but once since I have had the honor of a presence upon this bench the matter was raised in the Court in Banc, and it was then held to mean a publication of the docket in a Cole County paper. No opinion was written, and this is a further reason for me now to speak. I am unwilling to now sit in silence, and in that way say that for twenty-three years we, as a court, have been paying bills without authority of law. Nor am I willing to say that the construction of the statute in question by the other officers of the State for these

years has been wrong. I concede that the interpretation of statutes given by officers who are called upon to interpret them does not bind the courts, but it is at least persuasive. Such officers are not always mistaken in their reading and understanding of the law.

But going to this act itself and giving to it our own construction, I cannot concur in the majority opinion. It is true that in revisions changes were made, but these must be considered in the light of the circumstances surrounding. This is a cardinal principle of statutory construction. That at one time the statute clearly provided for publication, but in a revision thereof used clouded language, does not of necessity indicate a purpose of changing the effect of the statute. Because the Legislature used the more explicit word of "publication" in the previous act, and the less explicit word of "printed" in the oftentimes hurriedly drawn revision bill, does not, of itself, necessarily bespeak a change of legislative intent. Before the revision of 1889 the legislative intent was expressed in plain terms. That revision is not so definite and plain, but to my mind there is no such radical change in language as to indicate a change of legislative intent. So after all it strikes me that we are forced to consider the effect of the language used in section 2079, *supra*, with the usual lights, furnished by the law, for statutory construction. The language of the statute now in dispute, is "and a copy of the docket shall be printed in the county wherein such Supreme Court . . . shall be held." As has been said, this clause for twenty-three years has been construed to mean the publication of our docket in some newspaper in Cole County, because during that time the court has had a permanent abode here. I think the whole trouble arose by the unfortunate use of the word "printed" in the revision of 1889, instead of the word "published." Had the statute used the word "published" the term "in a newspaper," would necessarily follow, because in this

usage of the word such would be the natural meaning of the word. The word "printed" has a varied meaning according to the connection in which it is used. If we are referring to an imprint upon calico rags it has a fixed meaning. If we refer to an imprint upon a stone it has a fixed meaning. So I might go through a long list—*vide* Century Dictionary, Vol. 4, pp. 4731-2, under the verb "Print." But if we go to the word "print" used as a noun on the latter page of the citation we find this:

"4. A printed publication, more especially a newspaper or other periodical.

"What I have known

Shall be as public as a print.—Beau. and Fl., Philaster, ii. 4.

"The prints, about three days after, were filled with the same terms.—Addison." There is at least some relation between the verb and the noun, and the definition of the one sheds some light upon the definition of the other. But after all we know that the word "print" has a varied meaning, and its meaning in a particular law must of necessity depend upon the context of the whole act. So after all the real question is, what is the meaning of the word "printed" in this law. From time almost out of memory this court has had three "printed" forms of the docket, i. e. (1) a large size substantially-bound book for the use of the judges of the court; (2) a pamphlet or paper covering (in a more diminutive form) which the clerk mails to counsel upon both sides of the cases printed in the particular docket; and (3) a publication of the same docket form in a newspaper where the court was held. These were existing conditions when the present law was passed. Now it can hardly be said that the law refers to the printed docket prepared for the use of the individual members of the court, because there would be no sense in compelling that to be printed for forty days prior to the beginning of the term. The judges only need

this form of the printed docket when the court begins, and not sooner. Nor can it be reasonably said that it refers to the little pamphlet form of the docket mailed by the clerk to the lawyers. If the Legislature had in mind that kind of a "printing" it would not only have directed the printing, but likewise directed the publication, by saying that the docket when thus "printed" should be mailed to the parties to the suit. The fact that the law makes no provisions or requirement for the mailing out of these pamphlet dockets is conclusive that this kind of printing was not in the legislative mind. We have never had but the three forms as indicated above. If the law does not refer to our private docket, or to those pamphlet dockets, what form of printing could it refer to other than a publication in a newspaper. We repeat that it is unreasonable to say that the Legislature had reference to the pamphlet docket, because if so they would not only have directed the printing, but likewise the distribution by mail. Think for a moment of a legislative body directing the printing of a lot of dockets without any direction for their distribution. The only reasonable conclusion is that in the revision of 1889 they unfortunately used the word "printed" instead of the word "published," but meaning all the time a publication of our docket in a local newspaper.

Section 10340, Revised Statutes 1909, is one of the sources of our power to audit and pay each and all of the three classes of bills which we have heretofore audited and paid. If additional authority is sought it can be found in chapter 23, pertaining to "Clerks of Courts of Record." In the circuits of this State we find the clerks of the court furnishing the court with a docket such as we have here. We also find him furnishing the bar with pamphlet form of the same just as we have here. His authority so to do is under this chapter pertaining to "Clerks of Courts of Records." This court happens to fall within the class and there-

fore our clerk falls within the class. What is there paid for by the county is here paid for by the State as provided for by section 10340, *supra*. This disposes of two printed forms of our docket, and leaves only the publication of the docket as the only reasonable intent of the Legislature in formulating section 2079, *supra*. The act may be improvident. The necessity for the publication may not exist, but these matters should be addressed to the Legislature and not the court. My conviction is that the word "printed" as used in section 2079, *supra*, was intended by the Legislature to mean a publication in a newspaper in Cole County, the place where the court is held. There could be no reason for requiring the other class of printing to be done here. Our individual dockets, as well as the pamphlet form thereof, have to be printed, under the law, by the public printer and he may or may not have that part of his business domiciled here.

To conclude I am unwilling to say that this court and the other public officials who were called upon to construe this act for the past twenty-three years have been in error, and have for this length of time audited and paid out \$800 per annum without authority of law. The amount above paid is from my brother's investigations, rather than my own. I think the reasonable construction of this section 2079 justifies the construction heretofore given, and I therefore dissent to the able and exhaustive opinion of my brother. Legislative intent is the overshadowing question in the construction of statutes, and I can't conceive why a Legislature would direct the printing of our docket, except on the ground that by such printing it was to be made public. If it was the legislative intent to make it public in anyway, then if they had ordered a printing they would have suggested some means of making that printing public. I therefore desire to be recorded as dissenting from the majority opinion, as well as the unauthorized order which we have made. The author-

In re Publishing Docket.

ity of the order could well be questioned upon grounds other than the opinion or the dissenting opinion, but these should be held subservient to the more vital question of the meaning of the statute. *Bond, J.*, concurs; *Woodson, J.*, concurs in separate opinion.

WOODSON, J.—While I have not had the time or opportunity to investigate the statutes governing this question and reviewed by my learned associate Judge FARIS, nevertheless, almost as far back as I can remember, the docket of this court, under the supervision and control of this court, has been published in a newspaper printed in Cole County; and when I stop to consider the score or more of able jurists who have occupied this bench during that time, it causes me to hesitate, and ask the question, are we right, and were they wrong, or were they right and we wrong?

For myself, I am going to follow the footprints of the fathers, and, therefore, concur with all that has been said upon this subject by my associate Judge GRAVES, in his dissenting opinion.

PER CURIAM.—The court is of opinion that the publication of the docket in a local newspaper or any newspaper at public expense is not required by statute; that the amendment to the statutes, pointed out in the opinion of FARIS, J., herewith filed, have, when properly construed, taken away the necessity for such publication. It is therefore ordered that hereafter the clerk shall not cause to be published in a newspaper at public expense the docket of this court, to-wit, the list of cases set down for hearing in Banc or in Division at any term or call of this court.

Graves, J., dissents in an opinion filed, in which *Bond, J.*, concurs, and in which *Woodson, J.*, concurs in a separate opinion.

In Re Incorporation of BIRMINGHAM DRAINAGE DISTRICT v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Division One, August 9, 1915.*

1. **TITLE TO ACT: Broad Enough to Include Amendment.** The title to the Act of 1879, being "An Act to provide for the formation of drainage districts, to reclaim and drain swamp and overflowed lands in this State," was broad enough to include provision for any work, whether drain or levee, effectual for the purposes of reclamation; and in consequence, any subsequent amendment by mere reference to that act by section, article and chapter, as it later appeared in the Revised Statutes, fell within the title, so long as it related to the general purposes of reclamation; and all subsequent amendments have related thereto, and have been germane to the subject-matter of that act.
2. **DRAINAGE DISTRICTS: So Named in Act: Include Levees.** The fact that the Act of 1879 and subsequent amendments thereto have designated districts organized thereunder as "drainage districts" does not limit the activities of such districts to digging ditches, nor shear them of the power expressly given to construct levees.
3. ———: **Power to Construct Levees.** The Act of 1879 contemplated the construction of levees by drainage districts, and the Act of March 24, 1913, Laws 1913, p. 232, which by the processes of amendment has grown out of the Act of 1879, expressly provides for the construction of levees by such districts.
4. ———: ———: **Exclusive Methods.** The Act of April 7, 1913 (Laws 1913, p. 290) does not provide an exclusive method for the organization of districts when the construction of levees is contemplated.
5. ———: **Levees and Drains: Two Similar Statutes.** The fact that the Legislature by progressive amendments has brought the Act of 1879 (now Act of March 24, 1913, Laws 1913, p. 232) and the Act of 1887 (now Act of April 7, 1913, Laws 1913, p. 290) into almost exact harmony as to the character of lands which may be included in a district, the persons who may move for its incorporation and the methods to be employed in working out its destiny, does not destroy any part of the Act of March 24, 1913, or limit the powers by it explicitly conferred upon a

* Note—Certified to the Reporter January 20, 1916.

In re Birmingham Drainage District.

district organized under it. A district may be organized under that act for the purpose of reclaiming overflow land by the construction of a levee.

6. ———: Delegation of Legislative Power to Engineer. That part of section 10 of the Act of March 24, 1913 (Laws 1913, p. 232), which provides that the plan of reclamation, as reported by the engineer, or modifications thereof as approved by him after consultation, shall be adopted by the board of supervisors, is not unconstitutional as a delegation of legislative power to the engineer. In the nature of things there must be a plan, and some one must be empowered to adopt a plan, and manifestly the Legislature cannot provide detailed plans of reclamation in such general acts.
7. ———: ———: When Raised. Besides, the objection that said part of the act is unconstitutional on the ground that it is a delegation of legislative power to the engineer, not being one that goes to the whole act, does not fall within the scope of the objections which the statute prescribes may be made to the incorporation of the district.
8. ———: ———: ———: At the Hearing. Moreover, that objection should be made at the hearing.
9. ———: Non-Resident Supervisors. And an objection that the provision of section 5 of the act, authorizing the selection of supervisors who do not reside in the district or county in which the district is situate, violates the principle that "jurors must be of the vicinage," is not an objection that the statute prescribes may be made to the incorporation of the district, and is one that should be made at the hearing if it is to be urged on appeal. Besides, supervisors are not jurors, and the objection is untenable.
10. ———: Voting By Acres: No Representation by Owners of Personalty. That part of section 5 of the act which provides that in electing the first supervisors each "acre of land in the district shall represent one share, and each owner shall be entitled to one vote in person or by proxy for every acre of land owned by him in such district" is not unconstitutional, on the theory that it disfranchises those who own less than one acre and those owning personalty only. The exclusion from voting of those who own personalty only is not objectionable, since personalty is not in any wise affected by the act; and since it states each acre shall represent one share, it follows that each fraction of an acre represents a corresponding fractional portion of a share, and its owner is authorized to vote accordingly.
11. ———: Excessive Indebtedness: Special Taxes. An objection that the large sums necessary to construct the contemplated

improvement will create an indebtedness in the form of taxes in excess of and contrary to the constitutional limitation upon taxation, will not avail to defeat the incorporation of a drainage district. The costs of the improvement are benefits assessed against the property, and such assessments are not public taxes.

12. ———: **Sections Applicable to Former Organization.** Section 60 of the Act of March 24, 1913, Laws 1913, p. 232, applies to districts organized prior to April 8, 1905, and objections thereto are not available to proceedings begun under said act.
13. ———: **Inclusion of Railroad.** The Act of March 24, 1913, Laws 1913, p. 232, authorizes the inclusion of a railroad as a part of the drainage district. It is not excluded by section 39, which provides that the word "owner" as used in the act shall not include reversioners, remaindermen, trustees or mortgagees, "who shall not be counted and need not be notified by publication, or served by process, but shall be represented by the present owners of the freehold estate in any proceedings under this act," for that section does not exclude any one, whether the owner of a freehold or an easement in land.
14. ———: ———: **Entire Line of Road.** The fact that the railroad company's line will be left exposed to overflow for many miles along the river front at points not included in the district, does not authorize the exclusion of its entire line.
15. ———: **Inclusion of Lands not Benefited.** The extent to which a tract of land will be benefited does not go to the question of the propriety of including it in the drainage district, but rather to the amount of benefits to be assessed against it. Evidence showing that about one-fourth of the land included is in need of drainage at all times, that about one-tenth of it overflows only in times of very high water, that the remainder has overflowed frequently in the last score of years, and that a portion of appellant's railroad track has overflowed at times in recent years, will authorize a decree incorporating a drainage district, and the inclusion of appellant's track.
16. ———: **Unjustified Reclamation: When Objection Must Be Made.** The objection that the work of reclamation will be so costly that it will not be justified by the benefits which may accrue, should be made when the plan of reclamation has been adopted and the cost and benefits estimated. If it proves true that the costs will not be justified by the benefits, the court must dissolve the incorporation.
17. ———: **Other Property: Means Real Estate.** The words "other property" used frequently in the act of March 24, 1913, authorizing the organization of drainage districts, do not mean personal property, but land and all interests in real estate.

In re Birmingham Drainage District.

18. ———: **Ownership of Land: Testimony.** An objection to the testimony of a witness, made after he had, in answer to a question, testified that he knew of his own knowledge that the several signers of the articles of association for the drainage district owned in the district the respective number of acres set opposite their names, came too late.
19. ———: ———: **Testified By Tenant.** It is competent for a tenant to testify as to the persons under whom he holds possession of tracts of land included in the drainage district.

Appeal from Clay Circuit Court.—*Hon. Frank P. Divelbiss*, Judge.

AFFIRMED.

M. G. Roberts, Simrall & Simrall, Fred S. Hudson, D. C. Allen, James L. Minnis, N. S. Brown and Craven & Moore for appellants.

M. E. Lawson and Beardsley, Schaith & Beardsley for respondent.

BLAIR, J.—This is an appeal from a decree of the Clay County Circuit Court incorporating the Birmingham Drainage District in Clay County. The proceedings for the incorporation of the district were begun under the Act of March 24, 1913 (Laws 1913, p. 232 et seq.). The articles of association filed conformed to the requirements of that act. The property of the defendant railway, in so far as it was designed to include it in the district, is particularly described. The boundaries of the district as set out in the articles of association include 5,390 acres, and the signers of the articles of association represent themselves as owning, in the aggregate, several hundred acres in excess of one-half of the total. Appellant appeared and filed objections to the incorporation of the district as follows: (1) Denying every allegation "in the petition contained." (2) That the incorporation was not sought in good faith, in that the real object thereof

was to build an expensive levee along the river front of the proposed district, and that any drainage done would be only incidental to the construction and maintenance of the levee; that the incorporation, if granted, should be under the Act of 1913 (Laws 1913, p. 290 et seq.) pertaining to the organization of levee districts by circuit courts; and that the effort to incorporate under the Act of March 24, 1913 (Laws 1913, p. 232 et seq.), was a subterfuge devised in order to obtain powers the district could not exercise if incorporated in good faith under the act pertaining specifically to levees. (3) That appellant's property could not be benefited or protected by any plan of improvement the proposed district might adopt. (4) That the property, including that of appellant, proposed to be included in the district, did not constitute one contiguous body of wet, swamp, or overflowed lands or lands subject to overflow, within the meaning of the act under which petitioners were proceeding. (5) That the Act of March 24, 1913 (Laws 1913, p. 232 et seq.), had been repealed by the Act of April 7, 1913 (Laws 1913, p. 290 et seq.), "and the publication made herein is not sufficient notice of said incorporation under said act" of April 7, 1913. The trial court heard a great deal of evidence upon the location, character, ownership, and likelihood of the land within the proposed district to overflow, and, at the conclusion thereof, overruled all objections and entered its decree incorporating the district as prayed. The district lies along the Missouri river and has a frontage thereon of nearly or quite eleven miles. The relevant evidence will, when necessary, be sufficiently stated in connection with the discussion of the questions presented for review.

I. In 1879 (Laws 1879, p. 132 et seq.) the Legislature enacted the original act providing for the organization by the circuit court of drainage districts "to reclaim and drain swamp and overflowed lands,"

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and this act was incorporated in the chapter on "Lands" in the Revised Statutes of 1879, appearing as section 6207 et seq. By the processes of amendment the Act of March 24, 1913 (Laws 1913, p. 232 et seq.), has grown therefrom. In the Act of 1879 it was clearly provided that ditches, drains, levees, dikes and other works adapted to the reclamation of swamp and overflowed lands might be constructed by any district organized under that act. The title of that act was, "An Act to provide for the formation of drainage districts, to reclaim and drain swamp and overflowed lands in this State." That title was broad enough to include provision for any work, whether drain or levee, effectual for the purposes of reclamation. As a consequence, any subsequent amendment by mere reference to that act by section, article, and chapter, as it later appeared in the Revised Statutes, fell within the title so long as such amendment related to the general purposes of reclamation, and all subsequent amendments have related thereto and have been germane to the subject-matter of the Act of 1879. The fact that the Act of 1879 and subsequent amendments thereto have designated districts organized thereunder as "drainage districts" does not limit the activities of such districts to digging ditches, since both the title of the act and the act itself and the amendments thereof have always defined such districts in such manner as to include the broad, general methods of reclamation. The powers of such districts, expressly given, are not limited by a mere name conferred. One of the methods of reclamation is the construction of levees. The title of the Act of 1879 includes all methods of reclamation, using the general words "to reclaim and drain." The Act of 1879 clearly contemplated the construction of levees by districts organized under it, and the Act of March

Levees and
Drains:
Different
Statutes.

24, 1913, expressly provides for the construction thereof. [Sec. 26, Laws 1913, p. 249.]

The act of April 7, 1913 (Laws 1913, p. 290 et seq.), does not provide an exclusive method for the organization of districts when the construction of levees is contemplated. The original act, from which the last has been developed by amendment, was passed in 1887 (Laws 1887, p. 208 et seq.). When it was passed there was no provision in our statutes whereby a district could be organized in the circuit court for the drainage and reclamation of swamp or overflowed lands except upon the petition of a majority in interest of the resident owners. [R. S. 1889, sec. 6517.] The Act of 1887 authorized the organization of a levee district upon the application of a majority in interest of the owners of lands sought to be protected. The Act of 1887 therefore made provision for such organization, in particular circumstances, by others than those authorized to organize under the Act of 1879 and its amendments up to 1887. The Act of 1887, consequently, performed a different function, but was limited to particular kinds of lands. It did not, however, preclude a majority in interest of the resident owners from proceeding under the act of 1879 and its amendments. The fact that the Legislature, by successive amendments, has (Laws 1913, p. 232 et seq., and Laws 1913, p. 290 et seq.) brought the amended acts of 1879 and of 1887 into almost exact harmony as to the character of the lands which may be included, the persons who may move for incorporation, and the methods to be employed in working out the destiny of the district, does not destroy any part of the Act of March 24, 1913, or limit the powers thereby explicitly conferred upon districts organized thereunder. Neither of the acts pretends to provide an exclusive method for the accomplishment of its purposes.

The question is not whether the Legislature has provided by a separate act for the organization by the

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circuit court of districts empowered to construct levees. It is, on the contrary, whether districts organized under the act of March 24, 1913, are empowered to construct levees. For the reasons given we conclude they are so empowered.

II. (a) It is urged that section 10 of the act in question is unconstitutional because it provides that the plan of reclamation, as reported by the engineer, or modifications thereof as approved by him after consultation, shall be adopted by the board of supervisors. It is insisted this is a delegation of legislative power to the engineer, and hence is invalid. First. This does not fall within the scope of the objections which the statute prescribes may be made at this stage of the proceedings, it not being contended this objection goes to the whole act. The statute (Sec. 4, Laws 1913, p. 235) limits such objections to a denial of the statements in the articles of association. Second. This question was not raised on the hearing. Third. The contention is untenable, since the provision of the statute criticized does no more than provide that the plan of reclamation as adopted is to be approved by an expert engineer the board selects. Some one must approve such plan, and it is no more a delegation of legislative power to require the engineer's approval than it is to require that the board shall adopt the plan before it becomes the plan of the district. Manifestly, the Legislature cannot provide detailed plans of reclamation in acts of this character.

(b) It is objected that the provision, in section 5 of the act, authorizing the selection of supervisors who do not reside in the district or county in which the district is situated, violates the principle that "jurors must be of the vicinage." This is answered by the reasons numbered "first" and "second" in the preceding paragraph (a),

Delegation of
Legislative
Authority.

Non-Resident
Supervisors.

In re Birmingham Drainage District.

and is untenable also because the supervisors are not jurors at all. They are selected simply to work out the purposes of the district, and the selection from territory broader than the district and county increases the probabilities of securing efficient supervisors.

Further objecting to section 5 of the act, counsel contend it is unconstitutional because it provides that in electing the first supervisors each "acre of land in the district shall represent one share, and each owner shall

Voting be entitled to one vote in person or by
By Acres. proxy for every acre of land owned by him in such district." It is said this dis-

franchises those in the district who own less than one acre and those owning personalty only. Since personalty is not affected in any way under the act, the exclusion from voting of persons owing personalty only is not objectionable. Nor do counsel advance any argument to the contrary. So far as concerns the other point, the statute clearly states that each acre shall represent one share. It follows that each fraction of an acre represents a corresponding fractional portion of a share, and its owner is authorized to vote accordingly.

(c) The objection that the large sums necessary to construct the contemplated improvements will create an indebtedness in the form of taxes contrary to the constitutional limitation upon taxation

Excessive cannot be maintained. Sums assessed
Indebtedness. against property as benefits under acts in principle like that under consideration have always been held not to be public taxes. [Embree v. Road District, 257 Mo. l. c. 610, 611.] The "first" and "second" reasons given under paragraph (a), supra, also apply.

(d) The objections to section 60 are not well taken, since that section applies only to districts organized prior to April 8, 1905, and cannot affect appellant.

Prior
Organization.

III. It is insisted appellant's property was improvidently included in the district because (1) it is expressly excluded from inclusion by the provisions of section 39 of the act, and (2) its line is left exposed to overflow for many miles along the river front at points not included in the district

Inclusion of
Railroad.

(a) Section 39 simply provides that the word "owner" as used in the act shall mean the owner of the freehold estate and shall not include reversioners, remaindermen, trustees or mortgagees, "who shall not be counted and need not be notified by publication, or served by process, but shall be represented by the present owners of the freehold estate in any proceeding under this act." This section does not exclude any one. It describes those the Legislature deemed it necessary to notify. Appellant's argument that it does not own the freehold and does not fall within the definition of "owner," if agreed to as sound, would not exclude it from the district, but would exclude it from this case as a necessary party if a literal construction is given the statute. The point is ruled against appellant.

(b) The fact that other parts of appellant's line, outside the district, would be left unprotected is of no consequence. The proposition that a drainage district must include the entire line of railroad along a river or none can be included, is one which answers itself.

Entire Line
of Railroad.

IV. Upon the question whether the land proposed to be incorporated in the proposed district falls within the statute, the evidence conflicted to some extent. It appears that one-fourth of the land is clearly in need of drainage at all times. About one-tenth of it overflows only in times of very high water and the remainder has overflowed quite frequently in the last

Included Lands
Within Statutory
Designation.

score of years. It also appears that portions of appellant's track have overflowed at times in recent years. This is, briefly, the great weight of the evidence. This showing authorized the decree of incorporation. That a part of the land is overflowed only in case of unusual freshets has been expressly held to be no just ground for excluding it from the district. [Little River Drainage District v. Railroad, 236 Mo. l. c. 112.] In the same case it is held that "the extent to which a tract of land will be benefited does not go to the question of the propriety of including that land but rather to the amount of benefits to be assessed against" it.

V. The argument that the work of reclamation will prove so costly that it will not be justified by the benefits which may accrue is untimely. This objection must be made when the plan of reclamation has been adopted and the cost and benefits estimated. [Sec. 37, Laws 1913, p. 253.] If what is now argued in this connection proves true, then the court must dissolve the incorporation. This the section mentioned specifically provides.

VI. Some questions presented are founded upon the assumption that the words "other property" used frequently in the Act of March 24, 1913, mean personal property. A careful examination of the whole act discloses that these terms are used merely out of an excess of caution that all interests in realty should fall within the purview of the act. It is unnecessary to note every instance in which the words mentioned appear, but one or two examples may be given. In section 19 of the act, the Legislature prescribes the form of the certificates to be issued by the board of assessors in levying assessments or taxes. It is provided that this certificate shall set out the "names of the owners

**Costs and
Benefits.**

**Other Property
Means Real
Estate.**

In re Birmingham Drainage District.

of said lands and other property as they appeared in the decree of the court organizing said district; second, the descriptions of said lands and other property opposite the names of said owners; third, the amount of said installment of tax levied on each tract of real estate and other property." The certificate prescribed by section 23 for filing in the recorder's office to evidence the lien of assessments and taxes is like the preceding except that it reads: "Third, the amount of said taxes levied on each tract of land or piece of property." In section 18 the words used, in the same sense, are "all lands, railroad and other property." In section 43 they are "tract or parcel of land and upon corporate property." A fair interpretation of the whole act is that it does not refer to personal property.

VII. Witnesses who had signed the articles of association were permitted to testify that they owned certain land. Others testified that they
Objection to Testimony. knew of their own knowledge that certain of the signers owned designated tracts within the district. Objection was made to some of this testimony.

In answer to a question asked the witness Wright, he stated that he knew of his own knowledge that the several signers of the articles of association owned, in the district, the respective number of acres set opposite their names. After he had answered an objection was made. Under a long line of authorities, the objection came too late. As a matter of fact no effort was made by appellant to dispute the truth of the statement that the signers of the articles owned the land they represented themselves to own. As to 1,300 acres, the owners thereof testified it was their property. We do not understand objection was or is made to this testimony.

Concerning 780 acres, the tenant in possession testified as to the persons under whom he held posses-

sion of the tracts. This was competent. [Railway Co. v. Norcross, 137 Mo. l. c. 427.] As to another tract of over 600 acres, an attorney who represented the owner testified he was familiar with the land, its ownership and title, and that it was owned as appeared from the articles of association. There was no objection made to this testimony. In the circumstances, the point is ruled against appellant.

This disposes of all questions presented in the briefs. The judgment is affirmed. All concur, except *Bond, J.*, not sitting.

CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
OCTOBER TERM, 1915.

THE STATE v. LEVI BOUSLOG, Appellant.

Division Two, November 30, 1915.

1. **EMBEZZLEMENT: Venue.** Where the defendant was charged with embezzling money, the undenied testimony of a witness that defendant told him that he received a check for \$500 in one county and came to the county in which the indictment was found and there indorsed the name of the payee, at her direction, and cashed it, is sufficient, naught else appearing, to show that the venue was in the county in which the check was cashed.
2. ———: **Form: Check or Money: Variance.** Testimony by the defendant, charged with embezzling money, that the payee of a check for \$500 instructed him to indorse her name upon it and to bring the balance of the money to her, and that he did indorse it and cash it, and the testimony of another witness that defendant admitted he had gotten \$500 in money from the payee of the check, and of other witnesses that after he had cashed the check he failed to bring her \$200 of the money received by him, is sufficient to sustain the charge of having embezzled money of said payee, and does not show an embezzlement of the check, and there is no such variance as invalidates a conviction.
3. ———: ———: ———: **Burden: Converting Check Into Money.** In view of such showing, the burden is not upon the State to go further and show the form of the property at the time or place defendant conceived the felonious intent to em-

bezzle it. It is sufficient in order to sustain the charge of embezzling money, and to avoid a variance, to show that while the property of another was in the hands of the accused he changed or converted it into money which he failed to account for.

4. ———: **Venue: Converting Check Into Money.** And the venue where the charge is an embezzlement of money, is established by showing that accused converted a check into money in the county in which the venue is laid, and converted that money, or a part of it, to his own use.
5. ———: **Cross-Examination of Defendant: No Objection Except Immaterial.** Any error in the cross-examination of defendant charged with embezzling money, by which it is made to appear that defendant profited to the extent of several thousand dollars by other transactions between him and the prosecuting witness and whereby she lost practically all she had, is not reviewable on appeal, if the only objection made to the testimony at the trial was that it was immaterial. Such an objection is utterly insufficient.

Appeal from Jackson Criminal Court.—*Hon. Ralph S. Latshaw*, Judge.

AFFIRMED.

George M. Jacques for appellant.

(1) In a trial for embezzlement of money, admission of evidence tending to prove the embezzlement of any other property is error, and the admission of irrelevant or immaterial evidence which in its effects tends to injure the defendant in his material rights is error. (2) In a prosecution for embezzlement the State must show: first, that accused was an agent, servant, employee; second, that he received the money or other property in the course of his employment; third, that he received money or other property belonging to his principal; fourth, that he converted in county in which prosecuted the money or other property to his own use, with intent to steal and embezzle it. 15 Cyc. 497; Case v. State, 26 Ala. 17; Ex parte Hedley, 31 Cal. 108; Shelburn v. Com., 85 Ky. 173;

State v. Bouslog.

Com. v. Smith, 129 Mass. 104; State v. Adams, 108 Mo. 208; State v. Jennings, 98 Mo. 493; State v. Reilly, 4 Mo. App. 392. And in a prosecution for embezzlement the material allegations of the indictment or information must be proven as laid and the proof must correspond to the allegations of the indictment or information describing the money or property alleged to have been embezzled. 15 Cyc. 525; State v. Hanley, 70 Conn. 265; Weiner v. People, 186 Ill. 503; Com. v. Merrifield, 4 Metc. (Mass.) 468; State v. Schieb, 159 Mo. 130; State v. Dodson, 72 Mo. 283; Black v. State, 44 Tex. 620; State v. Hoshor, 26 Wash. 643. Nowhere in the evidence is it shown that the defendant received from the prosecuting witness lawful money of the United States in Jackson county, the nearest approach to this being the testimony of the witness Kilroy, and his testimony is that a check was received in Barton county and cashed in Kansas City, but evidence showing the embezzlement of a deed; draft, check or note does not support an information for the embezzlement of money. State v. Castleton, 255 Mo. 201; State v. Mispagel, 207 Mo. 559; State v. Wissing, 187 Mo. 106; State v. Crosswhite, 130 Mo. 366; State v. Dodson, 72 Mo. 283; Carr v. State, 104 Ala. 43; Lancaster v. State, 9 Tex. App. 393; People v. Leipsic, 62 Pac. 311; Com. v. Wood, 142 Mass. 459; People v. Meseros, 116 Pac. (Cal.) 679. Defendant's demurrer should have been sustained for the further reason that the venue was in Barton county. State v. Bacon, 170 Mo. 161; People v. Meseros, 116 Pac. (Cal.) 679. The information charges that while defendant was acting as the agent, clerk, collector and servant of the prosecuting witness, he did have, receive and take into his possession and under his care and control money to the amount of \$200, the same being lawful money of the United States. To support this information the State must show that the defendant received of the prosecuting witness in Jackson county, the sum of \$200

lawful money of the United States. This charge is not supported by proof of his receiving in Jackson county, of a deed to property in Barton county, or by proof of the receiving of a check which was afterward converted to the use of defendant. 15 Cyc. 525; State v. Schieb, 159 Mo. 130; State v. Mispagel, 207 Mo. 559; State v. Castleton, 255 Mo. 201; State v. Wissing, 187 Mo. 106; State v. Crosswhite, 130 Mo. 366; State v. Dodson, 72 Mo. 283; State v. Bacon, 170 Mo. 161; Carr v. State, 104 Ala. 43; Lancaster v. State, 9 Tex. App. 393; People v. Leipsic, 62 Pac. 311; Com. v. Wood, 142 Mass. 459.

John T. Barker, Attorney-General, and *Lewis H. Cook* for the State.

(1) No specific reason was assigned for the objections, but the objections throughout the trial were general in their character and did not acquaint the trial court with the reasons assigned therefor. Specific grounds of objections must be made at the trial in order to make the rulings of the trial court reviewable. State v. Goddard, 162 Mo. 198; State v. Lovell, 138 S. W. 623; State v. Miles, 199 Mo. 559. (2) It is for the jury to settle any conflict in the testimony, and although the verdict convicts the defendant of embezzlement by agent, yet if the evidence is substantial the Supreme Court will not disturb the verdict on the ground that it is insufficient or that it is against the weight of the evidence. State v. Rumfelt, 228 Mo. 443; State v. Miller, 188 Mo. 379; State v. McGee, 188 Mo. 409; State v. Leabo, 89 Mo. 255. (3) The defendant being the agent of Mrs. McClintock in securing this loan was vested with authority to cash this check, but in appropriating the money realized therefrom to his own use, he was guilty of embezzlement. The check was cashed in Kansas City, Jackson county, and the venue is established. A convincing and full answer es-

tablishing the venue is found in the testimony of Kilroy. *State v. Bacon*, 170 Mo. 162; *State v. Mispagel*, 207 Mo. 575. (4) The only witness called in behalf of the defense was the defendant, who admitted on the stand that he received a check for \$500, for which he gave a warranty deed signed in blank by the complaining witness. These matters were submitted by the court, under proper instructions, to the jury, and the jury, having considered the evidence, found the defendant guilty as charged. Their finding will not be disturbed, as there is substantial evidence to support their verdict. *State v. Sassman*, 214 Mo. 738; *State v. Shelton*, 223 Mo. 141; *State v. Wooley*, 215 Mo. 687; *State v. Sharp*, 223 Mo. 295.

FARIS, P. J.—Defendant was tried in the criminal court of Jackson county upon the charge of embezzlement. The jury found him guilty and fixed his punishment at imprisonment in the penitentiary for a term of two years. From this conviction, after making the conventional motions, he has appealed.

The facts are brief and so far as they are material in the illumination of the points discussed in the opinion, run thus: Defendant was engaged in the real estate business in Kansas City. He had certain dealings in real estate with one Mrs. Edith McClintock, who is the prosecuting witness in the case, by which defendant acquired from Mrs. McClintock certain farms in Nebraska and at Polo, Missouri, and certain town property at Excelsior Springs, and Mrs. McClintock acquired from defendant a farm in Barton county, Missouri. All of this property seems to have been very heavily encumbered with mortgages. In addition to the property exchanged by Mrs. McClintock with defendant for the Barton county farm, the former owned a house and lot in Excelsior Springs which was encumbered for \$1200, upon which encumbrance the holders were threatening foreclosure. The Clay

County Bank, with which Mrs. McClintock had dealings, was willing to take over this encumbrance, but was unwilling to take this latter property for the security of the full amount of the \$1200 encumbrance and insisted that the amount thereof should be reduced to \$800. Being unable otherwise to obtain this sum of \$400, Mrs. McClintock arranged with defendant to obtain this money for her on the Barton county farm, the defendant representing to her that he could get from five to seven hundred dollars on Mrs. McClintock's equity in this farm if she would execute a blank warranty deed therefor to be put up, as defendant expressed it, "in escrow." Sometime about the latter end of the year 1910 or the beginning of 1911, Mrs. McClintock executed and acknowledged a warranty deed to the Barton county farm, leaving the name of the grantee therein blank. Upon this warranty deed, defendant, sometimes in the early days of March, 1911, obtained \$500. Subsequently and on March 10, 1911, he paid to the Clay County Bank \$300 on the sum of \$400 which the bank demanded of Mrs. McClintock as a condition precedent to its taking up the \$1200 loan on her Excelsior Springs property. Defendant at the time claimed that the \$300 was advanced by him out of his own money. The balance of the \$500 procured by defendant through the use of the warranty deed on the Barton county farm, was never paid by him to Mrs. McClintock. Mrs. McClintock did not learn that defendant had used the warranty deed until the Barton county farm was lost to her, defendant having obtained the money on an agreement to re-pay the same within ninety days.

The proof shows that the check for the sum of \$500 in question was payable to Mrs. McClintock, and that defendant, according to his own admissions upon the trial, indorsed such check by request of Mrs. McClintock and collected it in Kansas City, Missouri.

Defendant admitted obtaining the check for the sum of \$500 by the means set out above, but contends that in addition to the \$300, which it is conceded he paid to Mrs. McClintock, and which was used in reducing the encumbrance on the Excelsior Springs property, he paid her in cash the further sum of \$200. He also contends that he paid certain interest on encumbrances on the property she traded to him and which she admits she agreed to pay, and that he paid the sum of \$100 to obtain the extension of the ninety-day redemption period on the Barton county farm. All these latter contentions are denied, however, by Mrs. McClintock. The record is obscure and unsatisfactory, but to eke it out so far as it is possible, its condition considered, reference will be made in the opinion to further facts.

OPINION.

The only questions so raised as to challenge our attention as matters of law, are (a) that the venue was not shown to be in Jackson county, and (b) that there was such a variance in the proof as to the nature of property embezzled as to be fatal to a conviction, in that he was charged with embezzling money, and the proof shows, as defendant contends, he embezzled either a warranty deed or a check. Both of these questions are discussed in the case of *State v. Mispagel*, 207 Mo. 557, which it is strenuously contended settles this case in favor of defendant. We do not think this is true whether (and the State urges us to re-examine it if it be apposite) the *Mispagel* case be correctly ruled or not. We reach this view upon the uncontradicted facts. One Kilroy, a witness for the State, testified that defendant told the witness that "he [defendant] got the \$500 check at Butler, then came to Kanas City. . . . He had the \$500 here in Jackson county and cashed the

Venue and
Variance.

check here.” There is no denial of the above statement. We hold that this statement was sufficient, naught else appearing, to show that the venue was properly laid in Jackson county.

Upon the other contention, that of variance, the testimony of the witness Kilroy shows that defendant admitted that he had gotten \$500 in money from Mrs. McClintock. But that is not all. The defendant testifying for himself and in answer to questions from his own counsel, says: “Q. This check [the check in controversy] that Mr. Jones gave you was for \$500? A. Yes, sir. Q. Who was that made payable to? A. Payable to Mrs. McClintock. I called her up and told her I had it and I wanted her to indorse it. She said, ‘Put my name on it,’ and said for me to bring the balance of the money to her.”

The whole case shows, if the witnesses for the State are to be believed—and the question of credibility is not for us, but for the triers of fact—that defendant was the agent of Mrs. McClintock to use the warranty deed and thereby to obtain this loan. He admits that she expressly made him her agent to indorse the check and bring her the money. He did indorse it and cash it, but other proof in the case shows he failed to bring her \$200 of the money. If the jury believed this, and the sequel indicates that they did, it was, other jurisdictional and evidentiary matters being shown, sufficient to sustain the conviction.

The facts of the instant case regarded, we do not see wherein the case falls foul of the rule announced in the *Mispagel* case, and so see no reason to re-examine that case at this time. For according to defendant’s own admissions to the witness Kilroy and when testifying for himself, he indorsed this check at the request of the prosecuting witness who was the payee therein, and having so endorsed it “cashed” it, i. e., turned it into money; and this was the *form* of it when he failed to account to Mrs. McClintock for it.

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So we say the burden is not and ought not to be put upon the State after such showing, to go further and show the form of the property at the time or place at which defendant conceived the felonious intent to embezzle it. It is sufficient in order to sustain the charge of embezzlement of money, upon the phase of avoiding a variance, to show that while the property of another was in the hands of the accused he changed or converted it into money which he failed to account for, and upon the phase of venue, that he did this in the county in which the venue is laid. If the rule were otherwise it would be well-nigh impossible to sustain convictions in fully half of the cases. There may be other means of avoiding a variance. We will rule them as we reach them. One other, we may pause to recommend to the prosecuting attorneys, would be to charge the embezzlement in as many counts as there are forms which the embezzled property assumed while the accused had it in his hands.

The cross-examination of defendant took a wide range, and some of it, which elicited facts as to other real estate transactions between defendant and Mrs.

Cross-Examination of Defendant: McClintock, by which it was made to appear that defendant profited there-
Other Transactions. by to the extent of some four thousand dollars, and that Mrs. McClintock lost practically all she had, may well have hurt defendant's case before the jury. However, the only objection made by defendant was that this evidence was immaterial. It needs no reiteration of cited cases to show the utter insufficiency of such an objection. So we disallow the general assignment of error within which this point falls and place it in that large category of cases, rarely mentioned by press or populace, but nevertheless numerous, in which the State is saved a reversal by a technicality.

We have carefully gone over this record and find no error saved which is meet for reversal, we must needs therefore affirm it. Let this be done. All concur.

THE STATE v. MARLANE CARIOU, Appellant.

Division Two, November 30, 1915.

1. **EVIDENCE: Homicide: Corroboration of Irrelevant Statements.** Copies of a periodical and catalogue found among deceased's effects, the one advocating free love and the other containing a price list of articles designed to prevent conception, are not admissible for the purpose of corroborating defendant's testimony that she believed deceased had taken away her unmarried sister-in-law for immoral purposes, or of elucidating the state of her mind at the time she shot deceased.
2. **INSTRUCTION: Defining Heat of Passion.** An instruction for murder in the second degree is not erroneous because it does not define the phrase "heat of passion."
3. **———: Homicide: Manslaughter in Fourth Degree: No Provocation.** The giving of an instruction for manslaughter in the fourth degree is authorized only when the evidence shows that an assault has been committed or personal violence has been inflicted upon defendant, either of which constitute what is termed "lawful provocation," the presence of which will reduce murder to manslaughter. But testimony that deceased had seduced defendant's unmarried sister-in-law, who had been a member of her household; that he had placed pernicious literature in her hands, that he had abducted her from defendant's home under promise of marriage and had returned without her, or his remark to defendant when she made inquiry concerning her sister-in-law just before the shooting that he had taken her to a place to have pleasure with her, is not evidence of lawful provocation, and will not authorize an instruction for manslaughter in the fourth degree.
4. **———: Mental Incapacity: Covered by Others Given.** It is unnecessary to give an instruction submitting to the jury the question of defendant's mental capacity necessary to relieve her from liability for the commission of a crime, if the court has already at the request of the State given an instruction properly presenting the entire matter.

Appeal from Lafayette Criminal Court.—*Hon. John A. Rich*, Judge.

H. F. Blackwell and *Chiles & Chiles* for appellant.

(1) The court erred in giving instruction 6 at the request of the State, for the reason that said instruction uses the term "heat of passion" without defining the same therein and without defining it in other instructions. *State v. Andrew*, 76 Mo. 105; *State v. Strong*, 153 Mo. 555. Said instruction 6 is also open to the objection that no mention is made of "heat of passion" in the attempted application of the law to the fact of killing. (2) The trial court erred in refusing to give defendant's instructions upon manslaughter in the fourth degree.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) The periodicals and books found by the administrator as far as the evidence discloses had never been seen by the appellant or by Marie Carion and could therefore have no bearing on the case. The refusal of evidence offered was not called to court's attention in the motion for new trial and is therefore not reviewable. *State v. Johnson*, 255 Mo. 287; *State v. Foley*, 247 Mo. 627; *State v. Gilmore*, 110 Mo. 1; *State v. Headrick*, 149 Mo. 404; *State v. Harlan*, 130 Mo. 394. (2) The court did not commit error by not defining "heat of passion" as used in the State's instruction defining murder in the second degree. There must be a request for an instruction to raise the question of court's failure to instruct. *State v. Thompson*, 250 Mo. 215; *State v. Starr*, 244 Mo. 183. Failure of the court to instruct on any subject must be mentioned in the motion for new trial. *State v. McBrien*, 178 S. W. 489; *State v. Douglas*, 258 Mo. 293; *State v. Conners*, 245 Mo. 482; *State v.*

Bostwick, 245 Mo. 486; State v. Dockery, 243 Mo. 592; State v. Conway, 241 Mo. 271. The instruction is more favorable to the appellant than necessary, and properly defines murder in the second degree. State v. Thomas, 78 Mo. 327; State v. Hudspeth, 159 Mo. 196; State v. Hyland, 144 Mo. 311; State v. Pleake, 178 S. W. 355. (3) The trial court properly refused to give defendant's requested instructions on manslaughter in the fourth degree. Appellant has cited a number of cases to the effect that there was a lawful provocation, and therefore an instruction on manslaughter in the fourth degree should have been given. State v. Bulling, 105 Mo. 204. There is a distinction between lawful provocation and just provocation. Lawful provocation would permit an instruction on manslaughter, but just provocation would only reduce the homicide to murder in the second degree. Epithets, together with insulting gestures, constitute only just provocation, and therefore would not authorize an instruction for manslaughter. Words of reproach, however grievous, including indecent, provoking actions or gestures, are not sufficient to free the party killing from the guilt of murder. Provocation must consist of personal violence. State v. Finley, 245 Mo. 465; State v. Myers, 220 Mo. 598; State v. Sebastian, 215 Mo. 58; State v. Goldby, 215 Mo. 48; State v. Geisky, 209 Mo. 331; State v. Ballance, 107 Mo. 607; State v. Edwards, 103 Mo. 518; State v. Gordon, 191 Mo. 114. There must be considerable personal violence, or if slight, it must be accompanied by circumstances of indignity or an assault, actual or menaced, or words or gestures accompanied by some act indicating an intention to follow them up by an actual assault or violence to the person in order to justify an instruction on manslaughter. State v. Hanson, 231 Mo. 14; State v. Elliot, 98 Mo. 150; State v. Chamber, 87 Mo. 406; State v. Keene, 50 Mo. 357.

State v. Cariou.

WALKER, J.—Appellant was indicted in Lafayette county for murder in the first degree in having shot and killed one Henri Herve. Upon a trial she was found guilty of murder in the second degree and sentenced to ten years' imprisonment in the penitentiary. From that judgment she appeals to this court.

The testimony for the State discloses that the appellant, Mariane Cariou, and the deceased, Henri Herve, lived at Summit Mine, near Lexington. The appellant lived with her husband and sister-in-law, Marie Cariou. The deceased boarded with Leon Peton. Deceased had been keeping company for some time with Marie Cariou. On March 27, 1913, a short time before noon, appellant came to Peton's and asked to see the deceased. Appellant came into the room where deceased and Amos, his roommate, were, and asked the former where Marie Cariou was and if she was in good hands. Deceased said that he had taken her to town and she was going to Pete Roland's. Appellant then went home. At about 12:30 or 1 o'clock p. m. the appellant came to the Peton home looking for deceased. Amos told her that he was not there. Albert Holm and John Llierberg were at the time passing through the Peton yard. Deceased came out of the cellar of Peton's house and was in front of Llierberg and Holm. Llierberg saw appellant run toward deceased, who was directly in front of Holm, with a revolver in her hand, and he called to Holm to look out. Holm thought that deceased was playing some trick on him, but turned and saw the appellant standing behind him with a revolver and immediately jumped to the side of deceased. Appellant at this time said, "He took my sister-in-law away," and deceased said, "You would not kill me for that." Appellant said, "Yes, I'll kill you." Deceased started to run and after he had gone four or five steps appellant shot him. He went four or five steps further, fell and died almost instantly. The shot entered

the left side of the back and came out the right side of the breast.

Leon Peton took the revolver away from appellant; there was one empty shell in it and four loaded ones. At the time of the shooting deceased had no weapon, nor was he resisting appellant in any manner.

Shortly before the shooting appellant called Florinda Fiora, a neighbor, over, and said she was going to kill that boy, meaning the deceased. The reason she gave for the intended killing was that he was going to take Marie Cariou away. Mrs. Fiora told appellant not to kill him, but she answered that it didn't make any difference, she would kill him anyway. She had a pistol in her hand at the time. When she went to Peton's she had the pistol under her apron. Just before the killing deceased said not to kill him, that he was not the cause of it, and after he was shot he fell and said, "I am lost."

After the shooting appellant asked for a gun and said she wanted to kill herself. She tried to kill herself with an iron and an empty bottle.

Marie Cariou, twenty years old and a native of France, testified that she had been in this country about one year. She left the Cariou home on the morning before the killing, because she was not satisfied there. She told appellant she was going to Roland's on the evening before; that she intended to go to work for Roland. The deceased met her that morning and they got into a machine and went to the Gueguen home. Arrangements had been made for her to work at Roland's. Appellant brought her to this country and paid her expenses. A few days before she left her brother's he offered her \$10 a month to remain there. She told him she did not want to stay. Deceased had never taken any liberties with her and quit visiting her on account of appellant's objections. Deceased had nothing to do with persuading her to leave and

she did not leave on his account. She was not satisfied, because appellant wanted to boss her too much. She would not let her go out with deceased or any one else. At one time she started out walking with deceased and went as far as the main road and appellant came after her. The night before the shooting she became engaged to deceased. He had asked her several times to marry him, but she would not give him an answer on account of the attitude of appellant.

The appellant went home after the shooting, got her little boy and started up the road toward town.

The evidence for the defense is substantially as follows:

Appellant testified that: In September, 1913, she went to France and returned in November, bringing her sister-in-law, Marie Carliou, with her. Marie Carliou began to go with deceased and appellant did not object until one day she found them locked in a bed room. When the door was opened Marie was sitting on the edge of the bed and Herve sat beside her. Appellant told her to come into the other room and deceased stayed in the bed room. Marie, in answer to the question as to how it happened, said that she was weak and could not resist him. Deceased came to see Marie after that, but appellant would never leave her alone with him, and would not let her go out with him unless she accompanied them.

On the Wednesday before the shooting Marie talked with her about leaving. Appellant told her not to leave, that she would save her honor. She told appellant she was going to work for Pete Roland. She left the house on the morning of the shooting with her valise. John Draulic came and told appellant that Marie and deceased had gone away in an automobile. Appellant said, "Yes, they may have gone to get married," and Draulic said perhaps they have gone to Roland's. Later Draulic told appellant that deceased had returned without Marie. Then appellant went over

and asked deceased where Marie was. He told her it was not her affair, that he had not eaten her, but had taken her to a place to have pleasure with her. After this she became excited and remembered nothing. The next thing she rememberd was that she was in jail, and she asked a prisoner why she was in there, and he said it was because she had killed Henri Herve. Previous to the shooting appellant had been confined in bed for eight days and had gotten up only on the Tuesday before the shooting. Deceased had given Marie a book which was objectionable to the appellant.

John Draulic testified that appellant told him that deceased was a good boy and she liked him, but she was mad because Marie left home. The defense introduced testimony that deceased was the agent for a paper entitled, "Conscience Generation." The appellant objected to Marie reading this paper. The State showed that appellant read it frequently and was a subscriber to it, and the paper had been coming to her house addressed to her. She denied that she was a subscriber or that she read the paper. Marie Carliou, on rebuttal, denied that she had ever had any improper relations with deceased or that she ever so stated to appellant, or that appellant had ever found her locked in a room with the deceased.

I. Appellant complains of the refusal of the trial court to permit the introduction on the part of the defense of copies of a French periodical and catalogue found among the effects of the deceased; the first advocating free love and the limiting of population by the prevention of conception; the second containing a price list of instruments and articles to effect the last named purpose. It is contended this testimony should have been admitted to corroborate or give credence to appellant's testimony that she believed the deceased had taken

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Marie away for immoral purposes and hence the state of her mind at the time of the killing.

The reasons urged for the admission of this testimony that it afforded provocation for the killing is without support upon any theory of the case. There is no rule of evidence which permits the introduction of testimony to corroborate irrelevant statements, and as the periodical and catalogue had no legitimate probative force of themselves the contention is without merit, even if it had been preserved for review in the motion for a new trial, which was not done.

II. It is contended that the instruction for murder in the second degree was erroneous in not defining the phrase "heat of passion." **Instructions.** Whatever foundation there may be for this contention is based upon an inaccurate expression in *State v. Andrew*, 76 Mo. l. c. 105, where it is said that an instruction for murder in the second degree is "subject to criticism" which does not define the phrase referred to. Despite this declaration, and it is nothing more, the instruction as given was held not to be prejudicial, for the reason that the phrase as there used was to be understood in the ordinary and not the technical sense of the words employed, and hence more favorable than otherwise to the accused. This being true, it is difficult to see in what respect it was "subject to criticism." The *Andrew* case, therefore, while it was inaccurate in expression, invoked the correct doctrine in regard to the use of the phrase in instructions defining murder in the second degree, but did not recognize the general application of the rule first announced in our reports in *State v. Wieners*, 66 Mo. l. c. 25, that the phrase, when used in instructions defining that degree of homicide, was to be understood in the ordinary sense of the words, and indicated no more than a state of the mind different from that of a cool state of the blood.

A reference to the cases in which this question has been discussed is not inappropriate in this connection.

In *State v. McKinzie*, 102 Mo. l. c. 627, it was held that the trial court should have defined "that heat of passion produced by a just cause of provocation which will reduce the homicide to murder in the second degree," no reason being assigned or case cited in support of this declaration.

In *State v. Strong*, 153 Mo. 555, the court declared an instruction for murder in the second degree erroneous because no definition was given of the words "in a heat of passion," citing in support thereof the *Andrew* case, which has been shown to be an authority to the contrary, and *State v. Forsythe*, 89 Mo. 667, and *State v. Hickam*, 95 Mo. l. c. 330, in each of which the charge was for an assault with intent to kill. These cases have no reference to an instruction for murder in the second degree or to the use of the phrase in controversy, and are therefore incorrectly cited in support of the ruling in the *Strong* case.

The case of *State v. Reed*, 154 Mo. l. c. 129, is not relevant, because the instruction discussed and held to be erroneous was for justifiable homicide and not murder in the second degree.

In *State v. Lane*, 158 Mo. l. c. 584, the reason for the rule as stated in the *Wieners* case was recognized and a definition of the phrase was held not to be necessary.

State v. Skaggs, 159 Mo. 581, is not relevant, because the instruction condemned was for manslaughter in the fourth degree, the court holding that the phrase "heat of passion" should have been defined. This was a correct ruling; manslaughter is a crime recognized by the common law, and the phrase "a heat of passion," being one of the elements of same, when employed in an instruction descriptive of the offense, is to be understood in its technical sense and its definition becomes necessary; but murder in the second de-

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gree is of statutory creation, and when the phrase is used in characterizing the offense it signifies no more than is indicated by the ordinary meaning of the words employed and requires no additional interpretation. This is the reason, and it is well founded, for the rule in the *Wieners* case.

State v. Pleake, 177 S. W. 1. c. 357 (not to be officially reported), is not an authority here, because the instruction there complained of was for manslaughter in the fourth degree.

From all of which it will be seen that where the rule has been recognized and observed it has been held not necessary to define the phrase in instructions for murder in the second degree and that rulings to the contrary have been arbitrarily made without any reason assigned therefor, and they are consequently not authorities to sustain appellant's contention. We therefore overrule it.

Appellant complains of the refusal of the trial court to give an instruction for manslaughter in the fourth degree. The giving of this instruction, under many precedents, is only authorized when it is shown that an assault has been committed or personal violence inflicted upon the defendant, either of which constitute what is termed "lawful provocation," the presence of which will reduce murder to manslaughter. [*State v. Ellis*, 74 Mo. 207; *State v. McKenzie*, 177 Mo. 1. c. 712; *State v. Weakley*, 178 Mo. 1. c. 423; *State v. Todd*, 194 Mo. 1. c. 396; *State v. Darling*, 199 Mo. 1. c. 197; *State v. Conley*, 255 Mo. 1. c. 198; *State v. Snead*, 259 Mo. 1. c. 432.]

The facts contended by the appellant to be necessary to constitute lawful provocation and hence authorize the giving of the instruction, are as follows: the alleged seduction of Marie Cariou by the deceased; the placing in her hands by him of pernicious literature; her abduction by him under promise of marriage; his return without her; and his remarks to ap-

pellant when she made inquiry concerning her. To hold that these facts are sufficient to authorize the giving of the instruction would be to overturn all precedent and in effect sanction the taking of the law by the appellant into her own hands to inflict such punishment as she deemed adequate to the injury she felt she had sustained. The inculcation of the doctrine this contention seeks to establish is pernicious in the extreme and, if approved, could not be otherwise than detrimental to the well being of society. Its establishment would result in the substitution of the vendetta and the right of personal reprisal for the orderly procedure of the courts in the administration of the criminal law.

There was no evidence authorizing the giving of instructions on accidental killing and justifiable homicide.

Appellant complains of the refusal of the trial court to grant an instruction submitting to the jury the question of the appellant's mental incapacity necessary to relieve her from liability for the commission of the crime. The giving of this instruction was unnecessary in view of the fact that the court had given an instruction at the request of the State properly presenting to the jury this entire question.

The record discloses that the appellant has been accorded every right to which she was entitled under the law. She was fortunate in being represented by able and industrious counsel, who have left nothing undone to present every possible defense that could properly be interposed in her behalf for the commission of this unprovoked murder. The jury would have been authorized under the evidence in finding her guilty of murder in the first degree.

The freedom from error of this record authorizes an affirmance of the judgment of the trial court, and it is so ordered. *Revelle, J.*, concurs; *Faris, P. J.*, not sitting.

THE STATE v. JOHN COLLINS, *alias* JOHN LEWIS, *alias* JOHN O'DAY, *alias* JOHN KANSE, *alias* JOHN KELLY, Appellant.

Division Two, November 30, 1915.

1. **PLEADING: Former Acquittal: Habitual Criminal.** Ordinarily the plea of *autrefois acquit* or *autrefois convict* should set out fully and accurately the former indictment, because the identity of the two offenses is the very gist of the plea, and because, before it is availing, the former conviction or acquittal must be had upon a valid indictment, and such identity and validity cannot otherwise be made to appear. But where the plea is directed to an indictment which alleges a former conviction and thereby seeks to charge defendant as an habitual criminal, it is not necessary to set out in the plea more than the indictment itself is required to contain, and to sustain the charge of being an habitual criminal it is required to allege only in general terms the conviction, date thereof, sentence, imprisonment and discharge upon compliance with the sentence.
2. **HABITUAL CRIMINAL: No Crime.** The statute does not authorize a conviction upon a charge of being an habitual criminal; it does not make an habitual criminal habit an offense. It only provides a severer punishment for the crime committed because of defendant's persistence in criminal conduct.
3. ———: **Twice in Jeopardy.** The statute prescribing a greater punishment for a second offense than for the first does not put defendant twice in jeopardy of conviction or punishment for one offense. It simply prescribes a severer punishment for the subsequent offense. Its penalties cannot be inflicted unless he is convicted of the second or a subsequent offense, nor unless he has previously been convicted of a specific crime.
4. **PLEADING: Habitual Criminal: Former Acquittal: Plea of Former Jeopardy.** Where the indictment charges defendant with the crime of larceny and with having been convicted of a former larceny in 1909, a plea to the indictment to the effect that he is being twice put in jeopardy of the offense of being an habitual criminal, and should be discharged, for that he was in 1911 acquitted under an indictment charging he was an habitual criminal, is not sufficient, for the reason that it is not distinctly pleaded that he was acquitted of the crime then charged to him. If he was convicted of the crime itself, but was acquitted on the charge of having been formerly convicted, this fact should have been distinctly pleaded, and it is not.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

AFFIRMED.

Thomas J. Rowe, Jr., for appellant.

John T. Barker, Attorney-General, and *Kenneth C. Sears* for the State.

(1) Though there is some confusion in the authorities the plea of *res judicata* (construing it to be a plea of *autrefois acquit*) is not sufficient in form. Kelley's Criminal Law and Practice (3 Ed.), sec. 235; King v. Wildey, 1 Maule & Selwyn, 183, 105 Eng. Rep. 69; State v. Heath, 8 Mo. App. 101; 2 Bishop's New Crim. Proc. (2 Ed.), secs. 810, 814, 815; Bishop's Directions and Forms (2 Ed.), sec. 1043, 95; 2 Hale P. C. 243; Crocker v. State, 47 Ga. 568; Smith v. State, 52 Ala. 407; Zinn v. State, 117 S. W. 136; Washington v. State, 32 S. W. 694; Queen v. Austin, 2 Cox's C. C. 59 (*contra*—no discussion). (3) The demurrer was properly sustained. McIntyre v. Commonwealth, 154 Ky. 149; Kinney v. State, 45 Tex. Crim. R. 504 (*contra*), 48 L. R. A. (N. S.) 207 (note). (a) The habitual criminal act is not a distinct crime; it neither compels or forbids any act, but merely fixes a method of punishment applicable to all crimes. It is therefore unique in criminal legislation. (b) Joinder of a charge under the Habitual Criminal Act does not make the indictment bad for duplicity. People v. Boyd, 64 Cal. 153; State v. Moore, 121 Mo. 514. (c) If the habitual criminal charge becomes unavailable the State can proceed upon the indictment as for a charge of a first offense. People ex rel. v. Clancy, 163 App. Div. (N. Y.) 616. (d) The habitual criminal charge may be upon an act committed outside the State. McDonald v. Commonwealth, 173 Mass. 322. (e) Likewise, it may be

for an act committed before the habitual criminal act was enacted. *People v. Raymond*, 96 N. Y. 38. (f) In California, by statute, if the defendant admits the prior conviction that portion of the information is neither read to nor considered by the jury. *People v. Carlton*, 57 Cal. 559. (g) In Louisiana the previous conviction should not be charged in the information and is only considered by the judge in passing the sentence. *State v. Hudson*, 32 La. Ann. 1052.

REVELLE, J.—Defendant was charged by indictment in the circuit court of the city of St. Louis with the crime of larceny from the person, and with having been convicted of a former felony, it being alleged that, on the 3rd day of May, 1909, he was convicted of larceny from the person, and after sentence, imprisonment in the penitentiary and discharge upon compliance with the sentence, he committed a second offense of larceny from the person. To that portion of the indictment charging him with a former conviction he filed a plea of former jeopardy, which he styles a “plea of *res judicata*,” and which is as follows:

“And the said John Collins in his own proper person, cometh in the court here and having heard the said indictment read, says, that the State ought not to further prosecute the said indictment against him, the said John Collins, charging him with being an habitual criminal under section 4913, Revised Statutes 1909, because on June 3, 1914, the same matters and facts set up in the indictment in this cause were set up and plead in the indictment in case No. 201, February Term, 1914, in Division No. 11 of the Circuit Court of the City of St. Louis for Criminal Causes, and this defendant says that all the matters and things alleged in the indictment in this case, with reference to charging him with being an habitual criminal under and by virtue of section 4913, Revised Statutes 1909, alleged

in the indictment herein, are the same matters and things and charge, conviction and confinement as alleged in the indictment aforesaid, upon which he was duly tried and acquitted by a verdict of the jury on June 3, 1914, in case No. 201, February Term, 1914.

"Defendant says that the offense of being an habitual criminal, as alleged, and all the facts upon which the same are bottomed were fully and finally adjudicated by the verdict of the jury rendered in the aforesaid case No. 201, February Term, 1914, in the Circuit Court of the City of St. Louis for Criminal Causes, Division No. 11, wherein defendant was duly tried by a jury and acquitted of being an habitual criminal, and this he is ready to verify.

"Therefore, he prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment above specified."

To this plea a demurrer was filed by the circuit attorney, and was by the court sustained. After arraignment and plea of not guilty defendant was tried by a jury, found guilty as charged, and his punishment assessed at imprisonment in the penitentiary for a term of seven years.

No bill of exceptions was filed, and the only question presented by this record is the action of the trial court in sustaining the demurrer to the plea of former jeopardy.

I. We have not been favored with a brief from appellant, but have his views through the oral argument of counsel.

At the threshold we are confronted with the State's insistence that the plea is defective in form, in that it does not set out the indictment, verdict or judgment, or any of these. The greater weight of authority is to the effect that the plea *autrefois acquit* or *autrefois convict* should ordinarily set out accurately and fully

Pleading:
Former
Acquittal.

the former indictment, and this because the *identity* of the two offenses is the very gist of it, and, further, because, before it is availing, the former conviction or acquittal must be had upon a *valid* indictment, and such identity and validity cannot otherwise be made duly to appear. If this plea went to the offense alleged, instead of merely to the charge of a former conviction, we would hold that, in order to fulfill the generally accepted requirements, it was necessary to set out the indictment literally, or at least so much thereof as would enable the court to determine from the averments the questions of identity of offenses and validity of the indictment. In view, however, of our impressions as to the true cast and character of the charge of former conviction, it can hardly be said that the sufficiency of this particular plea must be determined by that test. There is not in such cases involved any identity of *offenses* because there is no distinct *offense* alleged. It has never been held in this State that in an indictment alleging a former conviction it was necessary to set out the indictment, judgment or verdict, it being sufficient to merely allege in general terms the conviction, date thereof, sentence, imprisonment and discharge upon compliance with the sentence. [State v. Moore, 121 Mo. l. c. 519.] If the charge in the indictment can be thus briefly stated, it would seem illogical to require more of the plea. The instant plea, however, is defective in one substantial part, and this will be noticed in the succeeding paragraph of the opinion.

II. Loose and misleading language sometimes used in opinions which have dealt with the statute prescribing punishment in cases of second convictions seemingly is the basis of appellant's error. This statute creates no offense, and in no manner authorizes a conviction on a charge of being an habitual criminal, or anything else. It is not even a part of the article

on "Offenses," but is incorporated in the article on "Miscellaneous Provisions and Definitions." It only prescribes a punishment, and provides that in case of a second conviction the penalty shall be severer "because by his persistence in the perpetration of crime he has evinced a depravity, which merits a greater punishment." [People v. Stanley, 47 Cal. 113; State v. Moore, 121 Mo. l. c. 519, and cases cited.] As said in People v. Raymond, 96 N. Y. l. c. 39: "The first offense was not an element of or included in the second, and so subjected to added punishment, *but is simply a fact in the past history of the criminal*, which the law takes into consideration when prescribing punishment for the second offense. *That only is punished.*" The punishment is merely enhanced from the character of the criminal and is inflicted for the offense last committed. [Howard v. State, 139 Wis. l. c. 532; McIntyre v. Commonwealth, 154 Ky. 149; Commonwealth v. Hughes, 133 Mass. 496.] In some jurisdictions it is not even necessary to charge the previous conviction, this being considered only by the court in passing sentence. [State v. Hudson, 32 La. Ann. 1052.]

In some states we find statutes prescribing a severer punishment on a third conviction than the additional punishment provided for on a second conviction, and these statutes have been found free of constitutional objections. If the contention of appellant is correct such a statute could not be effectual, because, under such a theory, when the State utilized in the second case the conviction in the first it would be unable to again use the conviction in the first for the purpose of enhancing the punishment in the case of the third conviction.

This court in State v. Moore, 121 Mo. 514, held that the section prescribing a greater punishment for a second offense than for the first is not unconstitutional, either upon the ground of putting a person twice in jeopardy or prescribing different punishments for

different persons committing the same offense, it being said that this is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense. Further emphasizing the legislative intent as here interpreted, section 4914, Revised Statutes 1909, provides that persons convicted in other states, or in a foreign country, of an offense, which, if committed here, would be punishable by imprisonment in the penitentiary, shall, upon conviction for any subsequent offense within this State, be subject to the severer and additional punishment prescribed by the section under consideration. This section has recently undergone review by this court in *State v. Levy*, 262 Mo. 181. It is clear that under this statute no conviction could be had, and no punishment thereunder assessed unless the jury first found the defendant guilty of the particular *offense* charged in the indictment, and in this relation it is not amiss to note the plea's defective form. It no where appears from the plea whether the alleged former acquittal was on the charge of former conviction alone, or whether on the offense itself. If the defendant in that case was acquitted of the offense itself, it would necessarily follow that the question of his former conviction was not, and could not have been, passed upon, since such was but a mere incident to the main charge, and was not of such a separate and distinct character as to admit of an affirmative finding in the event of *acquittal* on the alleged crime. It is only in case of a conviction of the *offense* charged that an affirmative finding on this element is warranted. If he were convicted of the crime itself, but was acquitted on the charge of a former conviction, this fact should have been distinctly pleaded, and the plea discloses it was not.

The demurrer to this plea was properly sustained, because of insufficiency both in form and substance, and the indictment, verdict and judgment appearing regu-

lar and in proper form the judgment must be affirmed. It is so ordered. *Walker, J.*, concurs; *Faris, P. J.*, not sitting.

THE STATE v. FEATHERSTONE POWELL,
Appellant.

Division Two, November 30, 1915.

1. **CONFESSION: Law of Case.** A ruling upon a former appeal that a written confession obtained by the police captain and other officers from defendant was as a matter of law not voluntary and therefore inadmissible, becomes the law of the case on a second trial, unless a different state of facts is shown.
2. ———: **Swearing Away Legal Defects.** Legal defects which arose from the State's affirmative proof and which as a matter of law destroyed the voluntary character of defendant's alleged confession on the former trial, cannot be sworn away by the same witnesses upon the second trial without a commission of perjury. If the facts pertaining to the voluntary character of the confession were fully developed at the first trial, a holding that, upon the State's own showing, the confession was not voluntary and therefore inadmissible, became the law of the case on a second trial.
3. ———: **Other Oral Confessions.** But the inadmissibility of that written confession, obtained by policemen after continually "sweating" defendant for eleven hours, does not affect the admissibility of a prior oral confession made to a special officer which was not involved in the former ruling.
4. ———: **Guilt Dependent Upon.** Considerations of justice demand that great caution should be used and great exactness required in determining the admissibility of a confession by defendant where without that confession there is no substantial evidence of his guilt; and especially should that caution be observed where the confession contains a statement of fact which is conclusively shown to be false.

Appeal from Jackson Criminal Court.—*Hon. Ralph S. Latshaw*, Judge.

REVERSED AND REMANDED.

Horace S. Kimbrell and Griffin & Orr for appellant.

(1) On its face said confession shows it was not voluntary. The evidence shows it was not voluntary. Considering the fact that appellant was a colored man, twenty-three years old, a janitor for nine years in one position, his mental qualifications, his surroundings and the fact that nine police officers were sweating him for twelve hours, and the language of the confession itself, the trial court erred in admitting the purported confession in evidence, especially after it appeared that Captain Stone and officer Boult had told appellant that "it would be best for him to tell the truth" and "it would help him to tell the truth." *State v. Brockman*, 46 Mo. 566; *Underhill on Criminal Evidence*, sec. 128; *Wharton on Criminal Evidence*, p. 1328; *State v. Fredericks*, 85 Mo. 145; 12 Cyc. 464; *State v. Powell*, 167 S. W. 559; *State v. Thomas*, 250 Mo. 211. (2) This court ruled on the former appeal of this case that as a matter of law, on its face the alleged confession was inadmissible in evidence, and the trial court erred in permitting the said confession to be again introduced in evidence and read to the jury. The question of its admissibility was *res judicata*. *State v. Powell*, 167 S. W. 559; 7 Ency. Ev., p. 838; *Buchanan v. Smith*, 75 Mo. 463; *Hoyt v. Green*, 33 Mo. App. 205; *Cole v. Clark*, 3 Wis. 292; 3 Van Fleet on Former Adjudication, pp. 1310-1316; *Given v. Waggoner*, 116 Mo. 143; *May v. Crawford*, 150 Mo. 564; *Holmes v. Royal Loan Assn.*, 166 Mo. App. 719; *Havestock v. Rogers*, 177 Mo. App. 446; *Ward v. Haren*, 167 S. W. 1065; *Roth v. St. Joseph*, 167 S. W. 1155.

John T. Barker, Attorney-General, and *W. T. Rutherford*, Assistant Attorney-General, for the State.

(1) Admissibility of confession is a question for the court. *State v. Patterson*, 73 Mo. 605; *State v.*

McKenzie, 144 Mo. 48; State v. Stebbins, 188 Mo. 387; State v. Patterson, 73 Mo. 706; State v. Hattman, 196 Mo. 126; State v. Spaugh, 200 Mo. 596; State v. Hopkirk, 84 Mo. 283; State v. Brennan, 164 Mo. 510; State v. Wooley, 215 Mo. 620; State v. Ruck, 194 Mo. 437; State v. Barrington, 198 Mo. 109; State v. Ammons, 18 L. R. A. (N. S.), 768, and notes, p. 777; State v. Brooks, 220 Mo. 83; State v. Wilson, 223 Mo. 188; State v. Powell, 250 Mo. 216. (2) Cases where the question as to whether the confession was voluntary or involuntary were, or should have been, submitted to the jury: State v. Wooley, 215 Mo. 682; State v. Stebbins, 188 Mo. 396; State v. Jones, 171 Mo. 407; State v. Barrington, 198 Mo. 109; State v. McKenzie, 144 Mo. 44; State v. Thomas, 250 Mo. 210; Ammons v. State, 18 L. R. A. (N. S.) 842. (3) Confessions are presumed to be voluntary until the contrary is shown. State v. Armstrong, 203 Mo. 559; State v. Stebbins, 188 Mo. 397; State v. Jones, 171 Mo. 406; State v. Patterson, 73 Mo. 706; State v. Meyers, 99 Mo. 119; State v. Hattman, 196 Mo. 127; State v. Spaugh, 200 Mo. 597; Ammons v. State, 18 L. R. A. (N. S.) 783. (4) If it be proper to submit to the jury under appropriate instructions the question whether the confession is voluntary or involuntary, then and in that event the finding of the jury concludes the appellate court on disputed facts. State v. Fields, 234 Mo. 627; State v. Sharp, 233 Mo. 269; State v. Cannon, 232 Mo. 205; State v. Sassaman, 214 Mo. 738; State v. Fogg, 206 Mo. 696; State v. Tetrick, 199 Mo. 100; State v. Smith, 190 Mo. 723; State v. Richmond, 186 Mo. 87. (5) That the confession was made to an officer after the arrest does not tend to prove that the confession was improperly obtained. State v. Spaugh, 200 Mo. 597; State v. Brennan, 164 Mo. 510; State v. Barrington, 198 Mo. 109; State v. Wooley, 215 Mo. 682; State v. Church, 199 Mo. 631; State v. Phelps, 74 Mo. 136; State v. McClain, 137 Mo. 316; State v. Northway, 164 Mo.

316; State v. Simon, 50 Mo. 370; State v. Carlisle, 57 Mo. 102; State v. Shackelford, 148 Mo. 493; State v. Vaughn, 152 Mo. 73; State v. Wilson, 223 Mo. 178; State v. Green, 229 Mo. 651; Ammons v. State, 18 L. R. A. (N. S.) 796. (6) A confession made to one not in authority who said to accused that he was satisfied that he was guilty and that it was best to tell the truth is admissible. State v. Keller, 174 S. W. 71. (7) That the questions propounded to the defendant assumed his guilt, or that he was not warned that his statement would be used against him does not render such statement inadmissible. State v. Barrington, 198 Mo. 109; State v. Phelps, 74 Mo. 136; State v. Brooks, 220 Mo. 83; Ammons v. State, 18 L. R. A. (N. S.) 802; State v. Raftery, 252 Mo. 80. (8) It is no objection to the admissibility of a confession that it was made by the accused when he was without counsel, nor that he was not informed that he need not make a statement, or that any statement he might make would be used against him. State v. Gorham, 67 Vt. 365; State v. Patterson, 68 N. C. 292; Com. v. Sturtivant, 117 Mass. 122; State v. Barrington, 198 Mo. 23. (9) That the accused while under arrest was told by the officer in charge that if he was guilty of the offense charged it would be better to tell the truth about it, and thereupon the accused confessed, does not render the confession involuntary. State v. Armstrong, 167 Mo. 269; State v. Patterson, 73 Mo. 707; State v. Hopkirk, 84 Mo. 278; State v. Anderson, 96 Mo. 249; State v. Lipscomb, 160 Mo. 140; State v. Phelps, 74 Mo. 136; State v. Hedgepeth, 125 Mo. 22. Contra: State v. Powell, 250 Mo. 250; State v. Keller, 174 S. W. 72. (10) The admissions of an accused are always admissible in evidence against him when freely and voluntarily made. State v. Shout, 263 Mo. 370; State v. Wilkins, 221 Mo. 444; State v. Green, 220 Mo. 642; State v. Witherspoon, 231 Mo. 706; State v. Roberts, 201 Mo. 702; State v. Atken, 240 Mo. 262;

State v. Butler, 258 Mo. 436. (11) The rule of *stare decisis*, like other rules, has its exceptions, and the rule relaxes when a mistake was made on the former appeal or when it would work injustice and likewise where the facts are different. Mangold v. Bacon, 237 Mo. 511; Davidson v. Mayhew, 169 Mo. 265; Bealy v. Smith, 158 Mo. 521; Fuchs v. St. Louis, 167 Mo. 652. (12) When no direction is given on a former appeal in remanding a cause for a new trial, there is no adjudication made of the facts at issue in the case and the matter at issue remains as it was at first, unhampered by anything which occurred on the former appeal. Kelly v. Thuey, 143 Mo. 437; Baker v. Railroad, 147 Mo. 151; Mangold v. Bacon, 237 Mo. 516.

FARIS, P. J.—Defendant, convicted in the criminal court of Jackson County of murder in the first degree, and sentenced to imprisonment in the penitentiary for life, after the usual motions, appeals.

This is the second appeal in this case. [State v. Powell, 258 Mo. 239.] The facts of the homicide out of which this case arises have already been before us three times. [State v. Bonner, 259 Mo. 342; State v. Brown, 247 Mo. 715; State v. Powell, *supra*.] The facts proven upon the trial below from which the instant appeal is taken, differ in no material respect from those shown by the record in the other appeal herein, formerly considered by us. The evidence tended to prove that defendant, with one Arthur Brown and George Bonner, whose respective connection with this homicide is to be found detailed in State v. Brown, *supra*, and State v. Bonner, *supra*, together with defendant's two brothers, Halsey Powell and Cottrell Powell, in attempting to rob the freight office of the Missouri Pacific Railroad at Kansas City on December 1, 1911, shot and killed Albert Underwood, a cashier in said office. But as all the attending facts and circumstances are fully set forth in the two

cases last cited, and as the alleged confession of the defendant, as well as the facts and circumstances under which it was made and upon which his former appeal and the instant one both turn, are to be found set forth in *State v. Powell*, *supra*, we need not cumber the books with these facts again. So we content ourselves with referring the curious reader to the three cases above cited for such facts as we may not set out in detail in our discussion of the case.

OPINION.

When this case was here before it was reversed and remanded for a new trial on account of two things, which we then ruled constituted reversible error:

Confession. (a) the refusal to admit testimony offered by defendant in contradiction of the alleged confession, showing the whereabouts of Halsey Powell at the instant of the homicide, and (b) the action of the court in admitting the paper signed by defendant, purporting to be his confession. No other points were discussed, except such as were ancillary to the above two. Our ruling upon the last point, touching the admissibility of the defendant's confession, was thus summed up:

"It is not necessary to discuss the matter at greater length. We are convinced that the written confession was not voluntarily made, and should, therefore, have been excluded by the court. [*State v. Thomas*, 250 Mo. 189, l. c. 211, and authorities there cited.]"—*State v. Powell*, 258 Mo. l. c. 251.

Notwithstanding this holding the case is back here with the single point mooted that the learned court *nisi* erred in the instant case in admitting the identical confession which we had already ruled was inadmissible.

We are entirely satisfied with the correctness of our ruling upon this point when the case was here

before. It comes to us now absent no vices that it contained then. The testimony going to show its voluntariness *vel non* (herein as formerly still strenuously assailed) is substantially the same that it was before, except that the witness Boultt (and possibly the witness Phillips, though as to the latter the record is not clear), now relates an antecedent oral confession which it *seems* was not mentioned by them in their former testimony. (We may be in error as to this fact; we gather it from the four corners of the record only and have not compared the evidence of these two witnesses with their former testimony on this matter on the other trial.) But, even should we be in error as to this, it can not change the law of the case. For when, upon a full investigation of the question upon the former appeal we squarely ruled that the confession of defendant to Capt. Stone and the police officers was obtained in a manner which as a matter of law rendered it not voluntary and therefore inadmissible, this ruling became the law of the case upon another trial and likewise upon a second appeal, unless upon a second trial *nisi* a different state of facts was shown. [May v. Crawford, 150 Mo. 504; Bealey v. Smith, 158 Mo. 1. c. 521; Fuchs v. St. Louis, 167 Mo. 1. c. 652; Steinhäuser v. Spraul, 114 Mo. 551.]

To ascertain whether such difference existed as would serve to change our ruling we do not need to compare this record with the former one, as we would if necessary be permitted to do. For a casual reading of the present record discloses that the identical vices for which we before held the alleged confession to be inadmissible because not voluntary, inure in the one before us. Indeed, it is fairly patent that if legal defects, arising from matters of affirmative proof, existed before in laying the foundation of voluntariness in order to render the confession admissible in the former trial, these defects could not be sworn away upon this trial, absent perjury. Nor in our view have

they been so sworn away. Error before arose from the substantial fact that nine officers, for the most part police, collectively, or individually, or in pairs or trios, "sweated" defendant continuously from two o'clock in the afternoon till one o'clock next morning, at which time, after the police captain Stone and others of the nine apparently in Stone's presence, had told defendant it would "be best for him to tell the truth," he made and signed the alleged confession in evidence. Upon this record, as upon the former, we do not credit the statements of the defendant that he was beaten and maltreated; for on this point he is overwhelmed and utterly discredited by countervailing testimony. But here upon the instant record the other identical infirmities of foundation appear affirmatively from the testimony of witnesses for the State.

So we do not need to pass upon the mooted and troublesome point whether in a criminal case a ruling by us upon an evidentiary matter, the admissibility of which depends on a foundation laid, could become "the law of the case" upon subsequent trials and appeals, so far as to conclude appellate review here, regardless of whether or not a new and different state of facts was shown upon such subsequent trial. But that such a holding in the absence of an essential difference in facts proven upon the two trials would become the law of the case on such last trial, we do not question or doubt. Since herein we find no such essential difference, we continue to rule as we ruled before.

For the error in admitting the alleged oral and written confession made at Station Two in the presence of and to the nine officers, this case must be reversed. What we say does not apply to the alleged prior confession made to special officer Boultt before defendant was "sweated." Upon a trial anew, a proper foundation being laid, we see no reason why

these alleged admissions of defendant will not be competent.

No unbiased reader of this record can fail to be impressed with some doubt as to the guilt of this young negro defendant. If his confession be stricken down there is left scarcely a shred of proof of his guilt. And at least one fact contained in his alleged confession, to-wit, that his brother Halsey was present at, and participating in the commission of this crime, is conclusively shown to be false, if a statement may be proven false by human evidence. While confessedly it is a very human failing, superinduced doubtless by constant dealings with the hardened criminal classes, which induces police officers and detectives to follow the popular attitude and presume the guilt of an accused person rather than his innocence, which latter presumption the law enjoins upon the courts; nevertheless this popular presumption of guilt and the court-ruled and legal presumption of innocence cause trouble and misunderstandings in the administration of justice when they clash. This case proves the rule. For while defendant may be guilty there is such grave doubt of it, and the fact of guilt rests upon so thin a point, as to give us pause in so ruling, out of hand. His confession absent, he is upon the other facts shown, as innocent as the unborn babe. Therefore considerations of justice demand that great caution should be used and great exactness required in so close a case upon so grave a charge. *A fortiori*, since our rulings may be as well a bane to the innocent as they are the means of visiting justice upon the guilty. Abstractly, a wrong ruling as to a guilty person does not harm society; and but aids in doing justice upon him who deserves punishment; but such a ruling lives to be a precedent for the hurt and harm of the innocent, and so our duty is to write the law by which both the guilty and the innocent may be safely tried.

A rule of law fit only to try the guilty is no better than lynch law.

It results that for the error noted this case must be reversed and remanded for a new trial. Let this be done. All concur.

THE STATE v. HARRIS H. HORNER, Appellant.

Division Two, November 30, 1915.

1. **MANSLAUGHTER: By Automobile Driver: Sufficient Evidence.** Testimony that defendant was driving his automobile at a speed of fifteen to twenty miles an hour, at an intersection of two streets; that the view between him and the deceased pedestrian was unobstructed; that when deceased was ten or fifteen feet out in the street, after having left the sidewalk at the street intersection, and was walking in a straight direction, he was struck by the automobile and dragged twenty-five feet or more; that no warning or signal was heard; that deceased was apparently oblivious of the approach of the automobile until it was upon him; that going six miles an hour, as defendant testified, it could have been stopped in three or four feet, and that when defendant first saw deceased he was within three feet of him, and instead of stopping his car he swerved it in an effort to avoid hitting him, is sufficient evidence to support a verdict of manslaughter in the fourth degree based upon culpable negligence.
2. ———: ———: **Culpable Negligence: Definition.** An instruction defining "culpable negligence" as the failure to exercise "the highest degree of care which a very prudent and ordinarily skillful driver of an automobile would have used under the same or similar circumstances," and authorizing a conviction if the jury found that the death of the pedestrian at a street intersection resulted from the failure of defendant to exercise such "highest degree of care," is erroneous.
3. ———: ———: **Definition in Civil Code.** The statute (Laws 1911, pp. 330-331) authorizing a recovery of damages in a civil action for a failure to exercise "the highest degree of care," has reference to civil actions only, and in no sense is to be considered a part of the criminal code.
4. ———: ———: **Definition in Criminal Action.** Culpable negligence, as used in the statute (Sec. 4468, R. S. 1909) making the killing of a human being by the culpable negligence

of another manslaughter in the fourth degree, is the omission to do something which a reasonable, prudent and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding each particular case.

Appeal from the St. Louis City Circuit Court.—*Hon. Thomas C. Henning*, Judge.

REVERSED AND REMANDED.

John A. Gernez for appellant.

(1) The evidence upon the part of the State was inadequate to support the allegations of the information and defendant's requested instruction at the close of the State's case should have been granted. (2) The definition of "culpable negligence" given in the instructions is erroneous and vitiates all the instructions. Wharton on Homicide, sec. 445; State v. Emery, 78 Mo. 77; Shearman & Redfield on Negligence, sec. 7; Scott v. Crums, 2 S. C. 537.

John T. Barker, Attorney-General, and *Lee B. Ewing*, Assistant Attorney-General, for the State.

(1) The evidence was amply sufficient to sustain the verdict. State v. Watson, 216 Mo. 420; State v. Emery, 78 Mo. 77; Laws 1911, sec. 8, pp. 326-327; Karle v. Railroad, 55 Mo. 476; Stotler v. Railroad, 200 Mo. 107; Beford v. Johnson, 82 Ind. 426; Fredt v. Wheeler, 70 Minn. 161; Div. 528, 8 Am. Rep. 354. (2) Does the instruction correctly declare the law? State v. Landgraf, 95 Mo. 103; State v. Campbell, 82 Conn. 671; Kelley's Crim. Law & Prac., sec. 506; 3 Greenleaf's Evidence, sec. 129; Reg. v. Longbottom, 3 Co. C. 1. c. 440; Laws 1911, sub. 9, sec. 12, p. 330; Laws 1911, sec. 8, p. 326; Hays v. Hogan, 180 Mo. App. 242; 21 Cyc. 766; Anderson v. State, 27 Tex. App. 177.

WILLIAMS, C.—The information in this case charges defendant with manslaughter in the fourth degree under section 4468, Revised Statutes 1909, based upon the alleged culpable negligence of defendant in operating an automobile over the public streets of the city of St. Louis in such a manner as to run down and kill one Russell K. Cooper. Upon a trial had in the circuit court of the city of St. Louis, defendant was convicted and his punishment assessed at a fine of five hundred dollars. The evidence upon the part of the State tended to show that the death of the deceased occurred about 3:30 p. m., July 31, 1913, at the intersection of Fourth Street and Washington Avenue. At the hour of the accident there was very little travel on the street at that point. A west-bound street car had stopped just east of the intersection of these two streets for the purpose of taking on or letting off passengers. The deceased left the sidewalk, at the northeast corner of the street intersection and was walking rapidly, in a southwesterly direction, toward the southwest corner of the intersection. When he was some ten or fifteen feet out in the street, the automobile, which struck him, approached from the south, coming "fast." One witness estimated the speed at from fifteen to twenty miles an hour. The witnesses for the State testified that they did not hear any signal or warning given by the defendant who was driving the automobile. About this time, the street car started across the street but only moved about six feet into the street before it came to a stop. It is clearly inferable from the State's evidence that the view between deceased and defendant as defendant approached near the intersection was unobstructed. Deceased was at the center of the street where the street car tracks crossed when he was struck by the automobile. The defendant in driving the automobile undertook to swerve the machine to the left to avoid striking the deceased, but the right hand lamp

struck the deceased, knocking him down under the automobile, and he died in a short time thereafter. Deceased was apparently oblivious of the approach of the automobile until the same was upon him. Deceased's body was found lying about twenty-five feet from the place where the automobile struck him and the automobile was stopped about thirty-five feet from the point of collision.

The defendant testified in his own behalf, stating that he approached the intersection of the two streets running at a rate of about six miles per hour and the street appearing to be clear he sounded his horn, and started to cross the street on the right-hand side, and, as he approached the center of the intersection, deceased came running around the front of the street car which had started up. When defendant first saw deceased he was within three feet of the defendant's machine. Defendant yelled at him and swerved the machine to the left in an attempt to avoid striking him. That the car was a left-hand drive and that he did not know he had struck the deceased until he had crossed the street and looked back. He thereupon hastened to the side of the wounded man and helped place him in a conveyance so that he could be taken to a hospital. There was evidence tending to show that this automobile, going six miles per hour, could be stopped in a distance of three or four feet.

An appeal was duly taken by the defendant, and he now urges as grounds for reversal, 1st, the insufficiency of the evidence, and, 2nd, the error of the court in giving certain instructions.

I. Appellant insists that the evidence was insufficient to support the verdict. We are unable to agree with this contention. Under former rulings of this court, we are of the opinion that the evidence upon the part of the State was clearly sufficient to justify the submission

Sufficient
Evidence.

of the question of defendant's guilt to the jury. [State v. Watson, 216 Mo. 420, l. c. 435; State v. Emery, 78 Mo. 77.]

II. The instructions given by the court to the jury defined the term "culpable negligence" as the failure to exercise "the highest degree of care which a very prudent and ordinary skilful driver of an automobile would have used under the same or similar circumstances" and authorized a conviction if they found that the death resulted from the failure of defendant to use said "highest degree of care."

This was clearly erroneous. It is true that the Act of 1911 (Laws 1911, pp. 330-331) makes the "owner, operator or person in control of an automobile" respond in civil damages for any injury resulting from the failure to use "the highest degree of care" as by said act defined, but said act has reference only to civil actions, and is in no sense to be considered a part of the criminal code, and, therefore, has no part in fixing the standard of care required in measuring criminal responsibility. This prosecution is based upon section 4468 of our criminal code (Sec. 4468, R. S. 1909), and it is to that act we must look for the standard of care, the violation of which is to fix the criminal liability. Said section reads:

"Every other killing of a human being by the . . . culpable negligence of another, which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree."

The term "culpable negligence" as used in the above statute has been by this court defined as follows:

"Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man

would not do under all the circumstances surrounding each particular case." [State v. Emery, 78 Mo. 77, l. c. 80.]

To the same effect are the following authorities: Wharton on Homicide (3 Ed.), sec. 445; 3 Greenleaf on Evidence (16 Ed.), par. 129; Kelley's Crim. Law & Practice (3 Ed.), sec. 511, page 454.

It therefore follows that, because of the erroneous instructions given, the judgment must be reversed and the cause remanded. It is so ordered.

Roy, C., concurs.

PER CURIAM.—The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

JANE R. KEYES et al. v. GEORGE N. MUNROE,
Appellant.

Division Two, November 30, 1915.

1. **EVIDENCE: Unprobated Will: No Objection.** An unprobated will is not competent evidence of title; but if it is offered and admitted without objection, and there are facts in the record which amount to more than an inference that it had been probated, the trial court will not on appeal be convicted of error in admitting it.
2. **PARTIES: Deceased Devisees: Ejectment: Judgment for Whole.** Where plaintiffs claim title through a will which devised one-third of the land in fee to his widow, who has died since the suit began, a judgment which gives the whole of the land to the descendants of testator's deceased son and only other devisee, is erroneous, unless there is a showing that said son was the only child of said widow and that she died the owner of said one-third and intestate as to him, or if testate that she devised the land to him or his descendants.
3. **EJECTMENT: Identity of Names.** From identity of name prima-facie identity of person is to be presumed; but this prima-

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facie case of identity is liable to be shaken by the slightest proof of facts which produce a doubt of identity.

4. ———: ———: **Reyes for Keyes: Deed Contradicted by Index.** If the only proof to contradict the record of a deed made in 1859 showing E. N. Reyes to be the grantee is the record index showing E. N. Keyes to be the grantee, a judgment in ejectment for the heirs of E. N. Keyes cannot stand. The deed in such case would be the best evidence. But proof *aliunde* may be made that the deed was erroneously recorded, or that the name upon the record is Keyes and not Reyes, and that the apparent discrepancy arises from the age in the record or from blind writing; and if such proof of a substantial character is made, then the index is competent as a circumstance.

Appeal from Reynolds Circuit Court.—*Hon. E. M. Dearing, Judge.*

REVERSED AND REMANDED.

R. I. January for appellant.

(1) A will must be probated to pass title to land. *Snuffer v. Howerton*, 124 Mo. 637; *Smith v. Estes*, 72 Mo. 310. (2) A party plaintiff cannot impeach his own evidence. 1 *Greenleaf on Ev.*, sec. 442. (3) It is not permissible to introduce parol or intrinsic evidence to vary or contradict a judicial or deed record. *Sutton v. Cole*, 155 Mo. 206; *Long v. Long*, 141 Mo. 371; 1 *Devlin on Deeds*, sec. 193; 1 *Greenleaf on Evidence*, sec. 442. (4) The tax deed is prima-facie evidence of title in the purchaser. Sec. 11501, R. S. 1909. (5) The law does not require that the claimant under the tax deed, shall establish title against the whole world, but only between parties to the suit. *Machine Works v. Bowers*, 200 Mo. 236; *Graton v. Land Co.*, 189 Mo. 322; *Gage v. Cantwell*, 191 Mo. 698. (6) The index to deed records is no part of the record, and E. N. Keyes had no deed of record; so there was no constructive notice that E. N. Keyes ever had any title to the land. *Devlin on Deeds*, sec. 695; *Shepherd v.*

Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Bishop v. Schneider, 46 Mo. 472.

C. M. Buford, Arthur T. Brewster and Sam M. Brewster for respondents.

(1) Upon the whole record the judgment is for the right party. (2) The index to deed records is authorized and required by law, and may be resorted to for the purpose of aiding in the correct construction of a deed record. Sec. 10384, R. S. 1909; *Smith v. Lindsey*, 89 Mo. 76. (3) The court inspected the record and made a finding on a question of fact, and such, when supported with any evidence, is conclusive upon the parties. *Morrison v. Bomer*, 195 Mo. 535; *Chilton v. Nickey*, 169 S. W. 979. (4) The index being an ancient writing and being supported by competent evidence and other facts and circumstances is entitled to greater weight than the unsupported erroneous record of the deed. (5) It is immaterial whether the will of Ell N. Keyes was probated or not, for if probated title would be in the present plaintiffs through the will, and if unprobated they would still have the title by inheritance. (6) Title, like any other fact, may be established by circumstantial evidence, and it is not necessary that the circumstances should remove all reasonable doubt; a preponderance of the evidence is sufficient. *Brewer v. Cochran*, 99 S. W. (Tex.) 1033.

FARIS, P. J.—This is an action to determine interest to certain lands situate in Reynolds county. Plaintiffs had judgment vesting title to the whole of the lands in fee in them, and defendant appeals. Pending this appeal defendant departed this life, but since, pursuant to stipulation, Eva W. Munroe, defendant's sole devisee, has been substituted as appellant and the cause revived in her name; it is not deemed necessary to destroy the identity of the case by a change in

the style thereof, and this explanation stands in lieu of such change.

The lands involved are the northeast quarter and the east half of the northwest quarter and the northwest quarter of the northwest quarter of section 13 in township 33 north, of range 3 west, and situated as stated, in Reynolds county.

Both the petition and the answer are conventional and in the latter defendant joins with plaintiffs in praying the court to ascertain and determine the title as between the parties litigant.

The facts shown in evidence upon the trial are few and meagre and this meagreness has caused much difficulty in reaching a conclusion in the case. The lands were entered by one John Dorsey from the United States. On the 15th of June, 1859, Dorsey conveyed to one E. N. Keyes or to E. N. Reyes, of Cleveland, Ohio. Since the recorded copy of the deed shows the name as last above set out, about this question of whether the name of Dorsey's grantee is Keyes or Reyes a large part of the controversy turns.

Upon the trial plaintiffs offered a purported copy of the will of Ell. N. Keyes, who resided in his lifetime at Cleveland, Ohio; by the term of which will said Keyes gave his widow Elizabeth L. Keyes (who afterwards intermarried with one Churchill, and died pending this suit) *one-third of all of his real property in fee* and to his son Frank E. Keyes the residue thereof. Plaintiffs herein are the widow of said Frank E. Keyes, who died in 1899, and his two daughters, constituting all of his heirs. Mrs. Jane Rodgers Keyes, who is a plaintiff herein, and as stated, is the widow of Frank E. Keyes, deceased, testified orally in the case and in substance stated that E. N. Keyes (who plaintiffs contend is the grantee in the conveyance from Dorsey) died in Cleveland, Ohio, about 1870 or 1871; that he had resided there continuously from 1861; but that he was residing in 1859 (the date of the

conveyance from Dorsey), at Keyesville, Vermont; that search had been made for deeds or other muniments of title to the land in controversy both among the papers of E. N. Keyes and among the papers of Mrs. Churchill's estate, but that no such papers whatever in any wise having reference to this land were found. The only fact stated by this witness connecting plaintiffs' ancestor in identity with the grantee in the Dorsey deed, was the fact (elicited without objection) that Frank E. Keyes had come to some indefinite part of Missouri about 1895 to look for, or look after, lands which had belonged to his father. This witness stated, however, that the name of Reynolds county did not refresh her memory or suggest to her that the land in controversy was located therein, and that no taxes had ever been paid by her husband or any other of the family upon this land. In short the oral testimony is (and this though not objected to, was utterly incompetent) that the witness's husband came to some portion of Missouri in 1895 to look for, or look after, some lands, which had, as he averred, belonged to his father. Clearly, the weight of such testimony, even if it were competent, is negligible.

In passing it may be said that plaintiffs offered, over the objections and exceptions of defendant, the index to the deed records of Reynolds county, wherein it appears that entry No. 56, bearing date June 15, 1859, was a deed wherein John Dorsey was grantor and E. N. Keyes was grantee and that the lands conveyed were those in controversy here. This in substance is the whole of plaintiffs' proof.

Defendant offered a sheriff's deed dated May 24, 1882, purporting to convey under a sheriff's sale for taxes all of the interest of John Dorsey and E. N. Keyes to the land in controversy to R. I. January. To the introduction of this sheriff's deed plaintiffs made objection that it passed no title, for the reason that at the time of the tax suit, the judgment and sale said

E. N. Keyes had been dead for more than ten years. Other conveyances were offered from R. I. January down to defendant herein, but which are not pertinent to the points up for discussion. The land was conceded to be wild, timbered, uncultivated land, and no point is made as to any statute of limitations.

No declarations of law were requested or given on either side.

The points urged upon us for reversal are in brief: (a) that the judgment is against the evidence and against the law under the evidence and for the wrong party; (b) that the court erred in admitting incompetent evidence offered by plaintiffs, and (c) that specifically, the court erred in admitting the index to the deed records to vary the solemn record of the deed as found in the land records of Reynolds county.

OPINION.

Defendant contends that the will of E. N. Keyes offered in evidence does not show that it had ever been probated, and that for this reason it was not admissible

Unprobated Will. in evidence and could not pass title to the land in dispute. There can be no two diverse views as to the correctness ordinarily of this contention. But the record discloses that no objection whatever was made to this document when it was offered. If objection to it had been lodged with the learned trial court he would no doubt, as in duty bound (*Snuffer v. Howerton*, 124 Mo. 637), have sustained such objection. But we do not think we should sustain an objection to an instrument which is so vital a part of plaintiffs' case, when such objection is made for the first time in this court. While the record before us does not show probate thereof, there is more than an inference that the will was in fact probated. Proof of probate may have been at hand, and a timely objection below might have resulted in putting the

proof of the will into this record. It does appear that the Ohio probate court acted under and pursuant to its provisions, a thing we may safely assume it would not have done under an unproven will. We disallow this contention, so far as it is sought thereby to convict the court *nisi* of reversible error.

Touching this same will it is, however, urged that Mrs. Elizabeth K. Churchill (or her heirs, or devisees) is a proper party plaintiff. Mrs. Churchill was origi-

nally a party; but she was dismissed

Judgment. hence upon the trial, for the reason, as counsel for plaintiffs advise us in their brief, that she had died pending the action, and counsel farther urge that this fact of her demise was well understood by all parties as well as by the trial court, and that the action was tried by all concerned upon the theory that she was dead. We think this explanation is fairly well sustained by clear inferences which appear upon the record.

It does appear, however, that there was devised to Mrs. Churchill (who, as stated above, was the widow of said E. N. Keyes, and after his death married one Churchill) by the will which plaintiffs offered, one-third of the land in controversy herein in fee. She, or, if in fact she be dead, her heirs or devisees, own that one-third yet, and plaintiffs, so far as the record discloses, have no title or interest in it. The judgment of the court in so far at least as it gives the whole of this land to plaintiffs is erroneous.

The contention of plaintiffs that since they are all of the heirs of Mrs. Elizabeth Churchill it makes no difference whether she was a party or not, or whether the will was probated or not, might be well taken if it were borne out by the record; but it is not so borne out. The record shows that Frank E. Keyes, the father and former husband respectively of plaintiffs, was the only child of E. N. Keyes, but it does not show that he was the child of Mrs. Churchill, except by an ambig-

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uous inference, or that he was her only child, or whether she died testate or intestate, or whether she had or had not born of her marriage to Churchill issue, which either inherited her share or a part of her share in this land, or served as a conduit to pass title or a curtesy estate to her last husband. Upon the record before us the judgment of the court to this extent is erroneous.

Points on both sides of this controversy are dark and undeveloped. Their development would serve we think to promote justice in this case, which for aught that is shown by the record may lie with either side. For example, it may be that the deed which appears of record in the apparent name of E. N. *Reyes*, may be in truth to E. N. *Keyes*, and the seeming error a result of blind writing by the copyist, or of age in the record; if this be so, then an opportunity to put in proof upon this point should in deference to justice be afforded. There is no such competent proof in this record.

It may well be that more certain and definite proof of the identity of plaintiffs' ancestor with that E. N. *Reyes* or E. N. *Keyes* who bought this land from Dorsey in 1859 may be obtainable upon another trial. We

are mindful that from identity of name
 Identity of
 Names. prima-facie identity of person is to be

presumed. [Geer v. Lumber Co., 134 Mo. l. c. 95; Mosely v. Reily, 126 Mo. l. c. 129.] But this prima-facie case so shown is liable to be much shaken by the very slightest proof of facts which produce a doubt of identity. A well-known writer seems to state the rule on this point very acceptably and clearly:

"The probative force of the inference of identity from similarity of names is greatly diminished in force even to the vanishing point by introducing into the consideration of the matter facts inconsistent with the truth of the administrative assumption that similar

names identify a single individual." [2 Chamberlayne, Mod. Law of Ev., sec. 1191.]

As the case must be retried it may be well to say that it is clear that naught else appearing the index of the land records can not suffice to overturn the solemn recitals of a recorded deed. Nothing being shown upon one side but the deed and upon the other the index each contradicting the other, it is plain that the reason and logic of the case lie with the record of the deed itself as being the best evidence of the contents of the original. So much for the contrasted weight of the respective entries. If (as was not the case here) proof *aliunde* be made that the deed was erroneously recorded, or that the name is upon the record Keyes and not Reyes, and that the apparent discrepancy arises from the age of the instrument or from blind writing, then with some such substantial proof, the index would be competent as a circumstance. Standing alone as here, the index is insufficient to vary the letter of the deed record, and is therefore incompetent, and in the absence of other proof, or other attack upon the apparent reading of the deed, the court should have sustained the objection made to it.

For the errors noted, we think this case ought to be reversed and remanded for a new trial so that, if counsel are so advised, they may put in proof to illuminate points and corners of it, which are now so dark that the justice of it is fairly debatable. Let it be reversed and remanded for a new trial.

Walker, J., concurs; *Revelle, J.*, not sitting.

THEODORE C. LEONARD v. SOLOMON C. SHALE
et al.

Division One, December 2, 1915.

1. **CONVEYANCE: Wrongful Delivery: Unauthorized Opening of Letter.** The owner of land resided in Cincinnati, and his agent and brother resided in Missouri and was sick at the house of a friend and while there some kind of a trade was made for the land. The agent wrote the owner to make out a deed for the land, naming his host's son as grantee, inclose it in an envelope addressed to the agent, and inclose that envelope in another addressed to the agent's host. That was done, and when the letter was received by the host he opened both envelopes and immediately placed the deed of record without the knowledge or consent of either the agent or owner. Held, that the possession and record of the deed was wrongful, but that does not determine the rights of a subsequent innocent purchaser for value, even though the deed itself has been cancelled for non-delivery.
2. ———: ———: **Good Faith of Subsequent Purchaser.** A purchaser for a valuable consideration from the apparent record owner in possession of the land, with no knowledge that the deed to the apparent owner had been wrongfully obtained by him and placed of record without the owner's knowledge or consent, and with no such knowledge as would put him on inquiry, is not chargeable with bad faith. Nor does the fact that he had heard, before he made a loan on the land, that such apparent record owner had gotten a farm at a bargain, impugn his good faith in making the loan.
3. ———: ———: **Estoppel: Depositary: Violated Confidence: Innocent Third Parties.** No title passes to the grantee who wrongfully obtains or steals a fully executed deed and places it of record; but the grantor, as to subsequent grantees, may be estopped to dispute the validity of a conveyance by said grantee, by the conduct of the grantor in placing a fully executed deed in the hands of the father of such grantee, as his depositary, or by the conduct of the grantor after he knew such deed had been delivered and placed of record. So that where the owner's agent, residing at the residence of the grantee's father, wrote the owner to make out a fully executed deed, inclose it in an envelope addressed to the agent and inclose that in another envelope addressed to the father, and that was done, and when the letter came both envelopes were opened by the father and the deed immediately placed of record without the knowledge

or consent of the grantor or his agent, and the agent learned the facts soon after the deed was placed of record and the grantee and father went into possession and while in possession borrowed \$1500 from defendant, who knew nothing of the fraudulent facts, and secured the loan by a deed of trust on the land, and the plaintiff (the original grantor) knew for six months before defendant made the loan and obtained the deed of trust that the undelivered deed had been recorded, the plaintiff is estopped to dispute the validity of the deed of trust, because (1) he is chargeable with the knowledge of his agent who was in charge of the land at the time the deed was obtained, and (2) because he made the grantee's father the depositary of the deed and if he violated his confidence innocent third parties should not suffer, and (3) because he did not take prompt action, after he knew the deed had been recorded, to divest the grantee of his apparent record title.

4. ———: ———: ———: Prompt Action. The real owner of land cannot knowingly permit the title to stand upon the record in the name of another, and then defeat a mortgage placed thereon by such apparent owner, if the mortgagee acts in good faith and without knowledge of the true facts in taking the lien. A delay of six months by the grantor after he discovers that his fully executed deed had surreptitiously and wrongfully, without actual delivery, been placed of record, to bring proper proceedings to have the title divested out of the grantee, will estop him from enforcing his title as against a mortgagee who, without any knowledge of the fraud, in good faith in the meantime loans money to the apparent record owner.

Appeal from Buchanan Circuit Court.—*Hon. William D. Rusk*, Judge.

REVERSED (*with directions*).

C. W. Meyer for appellants.

(1) The aid of a court of equity can not be invoked when a party has slept on his rights and influenced others to act in the confident belief that he has relinquished his claims. *Pomeroy's Equity Jurisprudence* (2 Ed.), secs. 418, 419; *Landrum v. Bank*, 63 Mo. 48; *Schradski v. Albright*, 93 Mo. 48; *Hughes v. McAlister*, 15 Mo. 296. (2) Where a grantor has been guilty of negligence in having made, signed and acknowledged an instrument and in placing it where

the grantee might, if so disposed, readily obtain wrongful possession of it and so be enabled to deceive and defraud innocent third persons, he will be estopped from setting up his title as against a bona-fide purchaser for value under such deed. Jones on Mortgages (3 Ed.), sec. 604; Martindale on Conveyancing (2 Ed.), p. 189; Tisher v. Beckwith, 30 Wis. 55; Gage v. Gage, 36 Mich. 229. (3) If the real owner of property allows it to stand recorded in the name of another by a title such as to pass the fee, he puts it in the power of that other to create a valid mortgage upon it. Snodgrass v. Emery, 66 Mo. App. 462; Lawrence v. Inv. Co., 51 Kan. 222; 27 Cyc. 1036; Hunter v. Buckner, 29 La. Ann. 604. (4) The deed of trust attacked by respondent in this case is good for the following reasons, in addition to the points urged above: (a) Where one is in possession of land and has a deed of record, the possession will be referred to his deed unless there are facts known to the purchaser indicating a different possessory right. Washburn on Real Property (4 Ed.), star p. 35. (b) A mortgagee of realty or the beneficiary in a deed of trust on realty is considered a purchaser thereof. Steadman v. Hayes, 80 Mo. 319; 27 Cyc. 1183. (c) A mortgagee will generally be justified in relying on an apparently legal title in his mortgagor, as shown by the records. 27 Cyc. 1036, 1183-5; State v. Mathews, 44 Kan. 596. (d) There is no evidence whatever that Shale, or anyone acting for him, knew of the claim of Leonard on the land when the deed of trust in suit was executed, and when the money was advanced on the strength of this security. (e) If a mortgage be made without consideration and is afterward negotiated, the price paid by the assignee becomes the consideration of the mortgage and makes it a valid security. Jones on Mortgages, sec. 788; Hosmer v. Campbell, 98 Ill. 572; Hanrion v. Hanrion, 84 Pac. 381; Verity v. Sternberger, 172 N. Y. 633. (f)

Where one of two innocent parties must suffer, he who placed it within the power of the third party to commit the fraud, or he whose conduct caused the damage, must bear the loss. 2 Herman on Estoppel, secs. 766, 767; 16 Cyc. 773.

John S. Boyer and Vinton Pike for respondent.

(1) The issue in this case is eminently one of fact. The question of appellant's good faith is all that the case involves. The case is this: Respondent owned this land and at request of his brother, Dr. Leonard, sent a deed with Reed Huff's name written in it as a grantee in an envelope addressed to A. B. Huff, Reed's father, inclosing another envelope sealed and containing the deed and addressed to Dr. Leonard. A. B. Huff, who had consented to receive the package for Dr. Leonard, opened both envelopes, and without the consent or knowledge of Dr. Leonard or respondent took the deed to the recorder's office and filed it for record. In a suit by respondent against Reed Huff, the deed was set aside and record cancelled because it had been obtained and recorded as above. (a) The deed never having been delivered, no title passed, and Shale acquired no right under the deed of trust unless respondent has estopped himself. Shale's position is that he is an innocent purchaser in good faith. The *onus* is on him. *Stephenson v. Kilpatrick*, 166 Mo. 268-9. (b) "There must be an intent to convey and the delivery of the deed for the purpose of vesting a present title in the grantee, and a deed delivered without the consent of the grantor is of no more effect to pass title than if it were a forgery." *Felix v. Patrick*, 145 U. S. 329; *Weddecombe v. Childers*, 124 U. S. 405. "A deed which has been surreptitiously and fraudulently obtained from the grantor without his knowledge or consent does not, even as against a subsequent purchaser without notice, transfer his title." *Devlin on Deeds*, secs. 267, 322. "The deed 'in the eye' of

the law as it lay in escrow was a mere scroll. Its wrongful and untimely delivery by the custodian must not be allowed to be of any efficacy." *Bales v. Roberts*, 189 Mo. 69. (c) The deed was not delivered in fact or form to Reed Huff. A. B. Huff was the conduit through whom the paper was to pass to respondent's agent, Dr. Leonard. A. B. Huff was in no sense the agent of Reed Huff to accept it, nor of respondent to deliver it. He was a thief and nothing else. *R. S. 1909*, sec. 4542. (2) To maintain estoppel *in pais* fraud is essential "either in the intention of the party estopped, or in the effect of the evidence, which he attempts to put up." *Bales v. Perry*, 51 Mo. 453; *Hequembourg v. Edwards*, 155 Mo. 522; *Hill v. Epley*, 31 Pa. St. 334. And "it necessarily follows, that the party who claims the benefit of an estoppel, must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence, otherwise no equity will arise in his favor." 2 Pom. Eq. Jur., par. 813. (3) The court must defer much in this case to the action of the trial court. The appellant was charged with participating in Huff's fraud; and was before the court in person and testified in his own behalf. His evidence ought not to satisfy this court; and much weaker must it have seemed to the trial judge, where his manner was observed. *Short v. Taylor*, 137 Mo. 525. Besides this case is of the kind where the degree of proof must be clear and unequivocal and the circumstances free from suspicion. *Hennessy v. Murdock*, 137 N. Y. 317; *Chambers v. McCreeny*, 106 Fed. 367; *Willett v. Fistler*, 18 Wall. 91; *Gardner v. Weston*, 18 Iowa, 533; *Moore v. Smith*, 103 Mich. 387; *Snyder v. Harris*, 48 Atl. 331; *Stafford v. Brown*, 104 N. Y. S. 801; *Conlon v. Mission*, 79 N. Y. S. 406; *Parker v. Parker*, 63 Atl. 1094; *Meier v. Blume*, 80 Mo. 184; *Hoppen v. Doty*, 25 Wis. 591; *Parker v. Foy*, 43 Miss. 266; *Eck v. Hatcher*, 58 Mo. 241; *Trester v. Pike*, 62 N. W. 211. (4) Shale had the burden and

has not shown that he was innocent by clear and satisfactory proof. (a) He admits that there was a "little talk" around the Exchange about the Huffs and Leonard and this land and he caught "up more or less of it." The talk must have been about stealing the deed, which Shale calls getting the land "at a bargain." It gave the Huffs a bad name about the Exchange, because they got and recorded the deed surreptitiously, not that they had overreached Leonard in a deal. Shale says the Huffs and Leonard were well known there. There would be no occasion for "talk," but for the way the deed was obtained. A. B. Huff obtained the deed and Reed Huff was discharged from the post office and both were leaving the place. The talk could not have been that their good luck was taking them away, when their notoriously bad reputation was driving them away. (b) A. B. Huff says Shale and Reed Huff were acquainted while Shale says he only knew him by sight. If he was trying to help the Huffs cover this land he would wish his attitude toward them to appear to be that of a stranger; and his denial of an acquaintance with them ought to be construed as an admission from his standpoint that acquaintance with them spelled conspiracy to defraud Leonard. The court evidently believed they were acquainted as A. B. Huff states, and that Shale's denial was untrue, and made to evade the effect of intimacy with them. *Machinatur ad circumveniendum*. (c) Shale always has been friendly with the Huffs. He did not call Reed Huff as a witness, because his testimony would not be favorable to his cause, either as directly impeaching Shale or indirectly injuring it in the ordeal of cross-examination. In any view the inference is adverse. *Ellis v. Gulf*, 54 Fed. 481; *Kirby v. Talmadge*, 160 U. S. 383. Reed Huff lived at Garnett, Kansas, and A. B. Huff at Olathe. The one was as accessible as the other, and failure to produce Reed "creates the presumption that the

testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U. S. 121. Shale says he advised with his attorney and they "thought it would be a good idea to have his (A. B.'s) evidence. He was the party we made the loan to, and he knew the matter." The only matter about which his evidence could be desired was the fraud on Leonard. A. B. Huff says he negotiated the trade for the land, but did not tell what the trade was; and agrees "the land was never paid for" and that the deed was set aside—as he would state it—not as fraudulent, but "the decision was not clear." (d) Shale says he never talked with the Huffs before or after the pretended loan. When they defaulted, he made no effort to collect from Huff; never asked him to pay. Says he was never asked to prosecute Huff, but his attorney contradicts him as to that. When asked pointedly if he was not depending on collecting the money by means of the Leonard land and did not expect to collect of Huff, he answered, "Well, I don't know about that," and that he would have tried to collect the interest "if this had not been decided against us," and when Huff lost his case, he "knew then he would not pay." By the "us" he unconsciously associated himself intimately with the Huffs. His mind was hinged upon the original purpose to extract the money from the land and not from the Huffs. Throughout Shale acted like a man who had incurred no loss. (e) In a deposition Shale had stated that if he had known Huff was to pay only \$2000 for the land he would not have loaned \$1500 on it. He felt that admission made against him, and on the trial said he thought Huff was getting the land "for a bargain." How did he learn this? "Well, sir, I could not say more than you would hear people talk, and they would say they got it cheap, or something like that." Did he hear Huff was trying to steal it from Leonard? "Well, no; I can not say

that I did." If an honest man in Shale's situation were asked the question would he have hesitated in his answer, and left the implication that he may have heard it? *Nunn v. Brandon*, 24 Ont. 375. (f) The reputation of the Huffs was generally bad about the Exchange and was talked about in connection with their dealing with Leonard. This was what Shale heard, and he is presumed to have known all an inquiry about it would have led to. *Jones v. Smith*, 1 Hare, 55; *Willis v. Valette*, 61 Ky. 186. Shale says the story about the Exchange was something that "will cause a little talk around and you will catch up more or less of it." It was such as people "take interest in and discuss." The occasion of talk in fact was the theft of the deed. Shale shuffled, evaded and must have heard more than he would admit. (g) It was intimated that the money borrowed was used in improving the Leonard farms, "used it mostly on the places there." If the money was wanted for a purpose and was not used for that purpose, it was some evidence no money was supplied, and what they did on both places did not exceed in value \$75. If Reed were a witness he could not have accounted for any money of Shale. (h) The record does not show when *Leonard v. Huff* was begun—whether before or after the *Wilson-Shale* mortgage—nor does it appear that said suit was not promptly instituted and prosecuted. Laches must be pleaded and there is nothing here tending to show that the plaintiff did not diligently pursue his remedy. Plaintiff did not put Huff in a position where he could commit a fraud upon another. Huff got into that position by a criminal act and the rule appealed to by appellant does not apply. 16 Cyc. 773. See especially: *Walsh v. Hunt*, 120 Cal. 46; *Bank v. Clark*, 51 Iowa, 264; *Holmes v. Trumper*, 22 Mich. 432. (i) There is no evidence to justify the belief that any money passed permanently from Shale to Huff. Shale did not trace any money to Huff, but

significantly omitted to do so. He said he had in court checks which he would put in evidence but did not. The indorsements thereon might have led to a demonstration that the funds did not pass from him except as a pretense.

GRAVES, P. J.—Action to ascertain and determine title. Judgment below was for the plaintiff, and defendant has appealed. The facts relied upon by plaintiff are concisely stated in the petition thus:

“That the defendants claim to have some title, estate or interest in said lands; that the plaintiff is informed, believes and charges that the defendants’ claim aforesaid is based upon a certain deed of trust made by Reid H. Huff to the defendant, Charles W. Meyer, as trustee, to secure the payment of a note of said Huff to one William H. Wilson of the Philippine Islands in the amount of fifteen hundred dollars, payable three years after date, with interest at five per cent, which said deed of trust bears date November 3, 1909, was acknowledged before competent authority on said date and recorded on the same date in the recorder’s office of Buchanan county, in book 391, at pages 66 and 67; that the said Reid H. Huff, who made said deed, had no title, estate or interest in said lands, but had fraudulently, wickedly and surreptitiously obtained the semblance thereof by purloining from the custody of plaintiff’s agent, a deed which the plaintiff had made, signed and acknowledged and entrusted to said agent for delivery to said Reid H. Huff, in the event that said Reid H. Huff should make a contemplated purchase of said lands; that said Huff did not purchase said lands or any part thereof or interest therein, and said deed has been, in a certain action brought by plaintiff against said Huff, declared to be null and void, by reason of its non-delivery to him, and the record thereof has been set aside and can-

celled; that said action and the decree therein was lately had and made in this court, in which action this plaintiff was the plaintiff, and the said Reid H. Huff was defendant, and wherein the said Reid H. Huff was duly served with process and appeared in said action.

“That the said note made by Reid H. Huff to said Wilson, and pretended to be secured by said deed of trust to the defendant Meyer, was not made and delivered upon any consideration whatever from said Wilson, but the name of said Wilson was used as a cover for a transaction between said Reid H. Huff and the defendant Shale, and that while said note was made to said Wilson, it was intended for said Shale, and was by Wilson in form assigned and transferred to said Shale, who is now the owner and holder thereof.”

The answer admits that Shale is the owner and holder of the deed of trust and note mentioned in the answer, and avers that the same was duly and properly executed. The answer also sets up the plea that Shale was a purchaser for value of said note, and without notice of any alleged defects in the proceedings. In terse terms, that he, Shale, was an innocent purchaser, for value. There was also in the answer facts pleaded tending to show an estoppel.

The pertinent facts are such as can be stated shortly. Plaintiff was not a resident of Missouri, but had a brother who lived in St. Joseph. Plaintiff resided at Cincinnati, Ohio. He owned this land in Buchanan County, which was under the immediate control of his brother, Dr. Leonard. In January, 1909, Dr. Leonard was sick at the residence of A. B. Huff in South St. Joseph. A. B. Huff was the father of Reid Huff, who figures conspicuously in this case. During the time Dr. Leonard was at the residence of A. B. Huff some kind of a trade for this land and other

lands belonging to Leonard's sisters was made. Dr. Leonard wrote the plaintiff to make out a deed to the forty acres of land in question and inclose it in an envelope addressed on the outside to him (Dr. J. W. Leonard), and to inclose this in another envelope and address it to A. B. Huff, South St. Joseph, Mo., and mail it to A. B. Huff in that way. This was done. When Huff received the letter thus addressed, he evidently opened the letter to Dr. Leonard and took out the deed, and it was immediately placed of record without the knowledge or consent of either Dr. Leonard or the plaintiff. This deed conveyed the land to Reid H. Huff, and the Huffs took possession of the land. The deed was acknowledged in Ohio January 27, 1909, and recorded in St. Joseph January 29, 1909, or just two days later. In October, 1909, Reid H. Huff began to negotiate a loan on this land. The first arrangement was to get a loan of \$1500 from William H. Wilson, then in the Philippine Islands, through his brother, Sidney C. Wilson, an attorney at St. Joseph and an agent of William H. Wilson. This was to be a five per cent loan. Papers were accordingly drawn up, but Sidney C. Wilson found that he could get a better rate of interest for his brother, and the defendant Shale was induced to take the loan on this land. Accordingly the note was assigned to Shale and he put up the \$1500, which was received by Reid H. Huff, less the expenses of making the loan. There is no question of Shale being out \$1500. The plaintiff learned in April, 1909, that this deed had been placed of record, and Dr. Leonard, his agent, knew that it had been placed of record, about the date of its record. Shale says he had no knowledge of any trouble about the title until Leonard sued Reid H. Huff to cancel the deed. This was early in 1910. His suit was successful, and shortly thereafter the present suit was brought. Details will be left to the opinion. This outlines the case.

I. Upon this record it is quite clear that the possession and record of the deed from plaintiff to Reid

H. Huff was wrongful. It appears to have
Deed: been so held in a suit for its cancellation, in
Wrongful which judgment cancelling it was entered.
Delivery.

We start this case with that concession. A. B. Huff should have delivered plaintiff's deed to Dr. J. W. Leonard, and not to Reid H. Huff, as was evidently done. But this concession does not of itself justify the judgment *nisi* in the instant case.

II. The real questions in this case are (1) the good faith of Shale, and (2) the question of estoppel urged as against the plaintiff. We have

Good Faith of read this record thoroughly and there is no
Subsequent substantial evidence against the good faith
Purchaser. of Shale. Nor is there substantial evidence

tending to show that he had any knowledge of what happened between the Leonards and the Huffs. The fact that he had heard discussed at times that the Huffs had gotten a farm at a bargain, is not such as would impugn his good faith in making this loan. Nor is there any thing in this record that would cast upon Shale the duty to make inquiry. The record title was in Reid H. Huff. The Huffs were in possession, and nothing on the surface to call for an inquiry by Shale. We therefore dismiss this branch of the case by saying that there is nothing in the record which would impugn the good faith of Shale in the transaction, and that in good faith he parted with \$1500 on the apparent title of Reid H. Huff to this land.

III. Conceding then that the possession of the deed from Leonard to Huff was wrongful, and that the recording thereof occurred by reason of the wrongful possession, how stands the case?

It is undisputed that the Huffs went into possession

and remained in possession for a year. They were in possession when the deed of trust was made. **Estoppel.**

It is undisputed that the plaintiff's agent in charge of this land knew this fact. It is undisputed that plaintiff's agent, in charge of this land for him, knew of the record of this deed, at or about the time it was placed of record, and plaintiff admits that he knew of it six months before the defendant Shale bought the \$1500 note and deed of trust. With these patent and undisputed facts, should the plaintiff be protected by a decree such as was entered *nisi*? We think not. Respondent's very able counsel, in the brief say:

"The deed never having been delivered, no title passed, and Shale acquired no right under the deed of trust unless respondent *has estopped himself*. Shale's position is that he is an innocent purchaser in good faith. The onus is on him."

We think counsel have well expressed the law of the case. Defendant's evidence clearly shows good faith, and its force and effect is not impaired to any serious extent by a close and vigorous cross-examination, upon which the plaintiff relies. That Shale was in good faith when he took this note and deed of trust, we have no doubt under the record before us. That there were no circumstances which called for a special inquiry as to title by Shale is equally clear. No facts appear which would lead a reasonably prudent man to suspect that the record title was not the true title, and therefore there was no legal demand upon Shale to look further, or inquire further as to the title. The onus of showing good faith has been borne by the defendant Shale. The above leaves only the question of estoppel. This can be approached from two angles: (1) the conduct of the plaintiff in placing a fully executed deed in the hands of the father of Reid H. Huff and (2) the conduct of the plaintiff after he knew that such deed had in fact been delivered and placed of

record. For this case we may assume, as contended by plaintiff, that a deed stolen from a grantor, before delivery, passes no title to the grantee therein named, nor to one acquiring a deed from him, but there are exceptions to such a rule. Thus the Wisconsin court speaks in *Tisher v. Beckwith*, 30 Wis. 1. c. 58:

"The only question which can ever arise to defeat the title of the supposed grantor in such cases, is whether he was guilty of any negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee, might if so disposed, readily and without trouble obtain such wrongful possession of it and so be enabled to deceive and defraud innocent third persons. It might possibly be that a case of that kind could be presented where the negligence of the supposed grantor in this respect was so great, and his inattention and carelessness to the rights of others so marked, that the law would on that account estop him from setting up his title as against a bona-fide purchaser for value under such deed. [See *Everts v. Agnes*, 6 Wis. 453.]

"The same case (*Burson v. Huntington*, 21 Mich. 415) also makes a distinction between a note or other instrument so obtained and one deposited in escrow and afterwards fraudulently delivered by the depositors, holding that in the latter case the maker would be bound as against an innocent holder for value, on the ground of the trust or confidence reposed by him in the depositary, and upon the principle that, when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Upon the same question also of negligence, see *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. R. 395."

Both these doctrines apply to this case. The agent of plaintiff knew the relationship between A. B. Huff and Reid H. Huff (that of father and son and member

of the same household) when he directed the deed to be mailed to said Huff. This knowledge should be attributed to plaintiff, because his agent was the party in charge of the land (and its sale) which was the subject of the trade and deed. Then in addition to that the plaintiff made the elder Huff his depositary, and if he violated his confidence, innocent third parties should not suffer. Upon the ground of negligence, as well as the latter ground, the plaintiff should be estopped to assert his title as against Shale.

IV. Not only should the plaintiff be estopped by reason of his own negligence in placing an acknowledged deed in a place where its delivery might be obtained wrongfully, and by reason of the further fact that A. B. Huff was the depositary of his own selection, and thereby his agent, but his conduct after the delivery and record of the deed should bar his action by way of estoppel. In 27 Cyc. 1036 the rule is thus stated:

“If the real owner of property allows it to stand recorded in the name of another, by a title such as to pass the fee, he puts it in the power of that other to create a valid mortgage upon it. And the lien of a mortgage will prevail against the right of any third person to impeach and divest the mortgagor’s title as having been obtained by fraud or false representations, where the mortgagee relied on the clear record title of his mortgagor and had no notice actual or constructive of the rights of the stranger.”

Plaintiff knew that his deed was of record long before this deed of trust was taken by defendant Shale. He knew that the Huffs had gone into possession. The deed conveyed the fee to Reid H. Huff. Plaintiff should have taken prompt action toward divesting Huff of his apparent title. Such action would have saved the defendant Shale. One can not knowingly permit the title to his lands to stand in the name of another, and then defeat liens placed thereon by such person, if the

party who takes the lien, acts in good faith and without knowledge of the true facts. We have no hesitancy in holding that the conduct of plaintiff after he discovered that his deed had been delivered and placed of record, is such as to estop him from enforcing his title as against Shale. Where one of two innocent parties must suffer the one which has by his acts placed or left it within the power of a wrongdoer to do the wrong, must be the loser, under well established doctrines of equity. Plaintiff falls within this rule. A court of conscience can not permit Shale to lose his lien under the admitted facts of this case.

The judgment *nisi* is for the wrong party, and such judgment is reversed, with directions to enter up a judgment which will in all respects fully protect the deed of trust and interests of Shale. It is so ordered. All concur.

KINGSHIGHWAY SUPPLY COMPANY et al. v.
BANNER IRON WORKS, ERNEST C. F.
KOKEN, Trustee, and CITY OF ST. LOUIS, Ap-
pellants.

Division One, December 2, 1915.

1. **CITIES: Vacating Alley.** Subject to the constitutional inhibition against taking or damaging private property for a public use, the city of St. Louis, under its charter, has the power and authority by ordinance to vacate an alley.
2. ———: ———: **Abutting Property.** Property abutting on a public alley is property abutting along its sides, and not property that lies along the rear end of an alley extending into but not through a block.
3. ———: ———: **Right to Injunction: No Abutting Property.** The owners of land which lies only along the rear end of a

Supply Co. v. Iron Works.

public alley extending into a block, not being abutting owners, will, if the alley is vacated, sustain only such damages as are common to the public generally, and are not therefore entitled to a decree nullifying an ordinance vacating the alley.

4. ———: ———: Abutting Property: Special Taxes. *Held, arguendo*, that, in the absence of an express statute to the contrary, only such property as fronts along the side lines of a street or alley is chargeable with the costs of a public improvement therein, and land whose side line lies along the rear end of a blind alley is not so chargeable.

Appeal from St. Louis City Circuit Court.—*Hon. C. C. Allen*, Judge.

REVERSED AND REMANDED (*with directions*).

Schnurmacher & Rassieur for appellants.

(1) When the ordinance was passed, vacating the alley in question, the city of St. Louis, by the charter then in force, was vested with full power "to establish, open, vacate, alter, widen, extend, pave or otherwise improve, and sprinkle, all streets, avenues, side-walks, alleys, wharves and public grounds and squares and provide for the payment of costs and expenses thereof, in the manner in this charter provided." Former Charter of St. Louis, art. 3, sec. 26, par. 2; *Realty & Inv. Co. v. Deere & Co.*, 208 Mo. 66; *Knapp-Stout & Co. v. St. Louis*, 153 Mo. 560; *Knapp-Stout & Co. v. St. Louis*, 156 Mo. 344; *Christian v. St. Louis*, 127 Mo. 109; *Heinrich v. St. Louis*, 125 Mo. 424; *Glasgow v. St. Louis*, 107 Mo. 198. The city possesses the same powers under its present charter. Present Charter of St. Louis, art. 1, sec. 1, par. 14. And possesses this power respecting streets and public places dedicated under the Town Plat Act before the adoption of the Scheme and Charter. *Glasgow v. St. Louis*, 107 Mo. 198. (2) The power to vacate streets and alleys being expressly conferred upon the city, and absolute, it was for the mayor and assembly to determine whether the alley,

extending through part of a city block only, should be kept open or vacated in whole or in part, and not a question for the courts. *Gorman v. Railroad*, 255 Mo. 483. (3) Where a municipal corporation exercises a power expressly granted, as distinguished from one merely incidental to its power as a municipality, and therefore implied, the motives of the municipal authorities will not be inquired into by the courts and the courts will not interfere, unless it appears that an ordinance passed in pursuance of such power is the result of fraud or the product of legislative whim or mere caprice. *Swinner v. Heman*, 148 Mo. 355; *Dillon's Municipal Corps.* (5 Ed.), secs. 5801, 1160, p. 1839, note; *McQuillin's Municipal Corps.*, sec. 703. (4) Where, in the honest judgment of the public authorities, in whom the discretion is vested, the vacation of a street or alley is for the public good, it can make no legal difference that private interests are also benefited. It may be that such private advantage redounds to the welfare of the general public. These are questions of legislative expedience and for the decision of the municipal officers; not for the courts. *Glasgow v. St. Louis*, 107 Mo. 203; *Kansas City v. Hyde*, 196 Mo. 508; *McQuillin's Municipal Corps.*, sec. 1403, p. 2988. (5) So much of the ordinance as provides that the vacated alley shall revert to the abutting property, is mere surplusage, and only declaratory of the law itself. *Dillon's Municipal Corps.* (5 Ed.), sec. 1160, p. 1839, note; *Improvement Co. v. Railway*, 255 Mo. 519; *Thomas v. Hunt*, 134 Mo. 392. (6) The fact that the ordinance requires the abutting owners to compensate the city for the vacated ground, does not invalidate the ordinance. The modern conception is to require such compensation from those who derive an incidental benefit. Having the absolute power to vacate, the city could vacate conditionally. *Patton v. Rome*, 124 Ga. 525; *Investment Co. v. Frazier*, 137 Mich. 108. (7) The property of plaintiffs

does not abut the alley, nor was the alley ever a part of their property. Neither the front nor rear of their lot is bounded by the alley, nor does the alley parallel or run along either of their side-lines. The alley is *cul-de-sac* through part of the block and "dead-ends" against the north side of the property of plaintiffs. Plaintiffs, therefore, are not abutting owners. Realty Co. v. Police Jury, 127 La. 318. Whatever damage plaintiff sustained by the vacation of the alley was in common with the public generally, differing at most in degree and not in kind. To enable plaintiffs to maintain an action, either at law or in equity, it was necessary to plead and prove a damage special and peculiar to themselves. Realty & Inv. Co. v. Deere & Co., 208 Mo. 66; Knapp-Stout & Co. v. St. Louis, 156 Mo. 344; Knapp-Stout & Co. v. St. Louis, 153 Mo. 560; Glasgow v. St. Louis, 107 Mo. 198. And the fact that plaintiffs may be compelled, after the vacation of the alley, to pursue a somewhat longer route to reach their property from its street front, constitutes no peculiar or different injury. Zettel v. West Bend, 79 Wis. 316; Clark v. Railway, 70 Wis. 593. (8) If plaintiffs have been unlawfully injured, they have a complete and adequate remedy at law in an action for damages. Therefore they are not entitled to relief by injunction. Christian v. St. Louis, 127 Mo. 109.

John L. Corley for respondents.

(1) "The alley in each block is a complete entity in itself and it is immaterial to the owners of the property in one block whether there is an alley in the next or any other block or not, and, likewise, immaterial to the general public whether there are any alleys or not. It seems to us that it is plain that abutting property owners on an alley have property rights in the entire alley not shared by the general public." Corby v. Railway, 150 Mo. 457; Faust v. Hope, 132 Mo.

App. 287; *Dries v. St. Joseph*, 98 Mo. App. 611. The case of *Christian v. St. Louis*, 127 Mo. 109, was decided on the equities involved and not in contravention of any of the principles contended for herein. The owner of property in the block where a public alley is situated has rights independent of any reversionary interests, and regardless of whether their property abuts on the portion of the alley sought to be closed. This is the right to a means of egress and approach over the alley. *Christian v. St. Louis*, 127 Mo. 109; *Bailey v. Culver*, 84 Mo. 531; *Corby v. Railway*, 150 Mo. 457. The plaintiffs in this case have no adequate remedy at law. A mere causal examination of the location of their property demonstrates this fact, and a court of equity in the exercise of a wise discretion has the right to intervene to prevent a wrong which has no full and adequate remedy. *Christian v. St. Louis*, 127 Mo. 109; *Bailey v. Culver*, 84 Mo. 531. (2) While the city has the general power to close streets and alleys, it is also within the province of the courts to say whether the use for which it was closed is public or private or whether any private rights have been invaded. *Gorman v. Railroad*, 255 Mo. 483; *Kansas City v. Hyde*, 196 Mo. 498; *Mining Co. v. Joplin*, 124 Mo. 129; *Smith v. McDowell*, 148 Ill. 51; *State v. Franklin*, 133 Mo. App. 493; *Glasgow v. St. Louis*, 107 Mo. 198; *Aldridge v. Spears*, 101 Mo. 400. (3) There is no basis to the contention raised in the trial of this case that the portion of the alley closed does not abut the property of the plaintiffs. No distinction is made in any of the decisions between the ordinary accepted meaning of the word abut and its legal significance. The New Century dictionary defines the word as follows: "To touch at the end; to be contiguous; joined by a border or boundary; to terminate; against or in contiguity with, to impinge upon." And illustrates the word "abuttal" thus: "That piece of land that abuts on, or is con-

tiguous to another; a boundary, a line of contiguity."

(4) Equity looks to the substance rather than to the form and looking to the substance of ordinance No. 25203 it is plain upon its face that the closing of this alley was conditioned upon the payment of two hundred dollars to the city by the appellants. Section 2 says: "The owners of said abutting land shall pay to the treasurer the sum of \$200 within thirty days after the passage of this ordinance, otherwise said ordinance shall be null and void." This clearly left the power to say whether the alley should be vacated or not in the hands of this private corporation. The Municipal Assembly has no authority to so delegate its power. *Merchants Exchange v. Knott*, 212 Mo. 616; *Neill v. Gates*, 152 Mo. 585; *Kansas City v. Bacon*, 147 Mo. 259; *Ruggles v. Collier*, 43 Mo. 353. (5) The provision that "the owners of said abutting land shall pay to the treasurer the sum of \$200.00 within thirty days after the passage of this ordinance, otherwise said ordinance shall be null and void," plainly makes the transaction an attempted sale to the appellants of the portion of the alley closed. This the city is without authority to do. *Kansas City v. Hyde*, 196 Mo. 498; *State v. Franklin*, 133 Mo. App. 493; *Smith v. McDowell*, 148 Ill. 51, 22 L. R. A. 395; *Watsen v. Gutman*, 24 L. R. A. 403; *Harten v. Williams*, 99 Mich. 429; *Deland v. Powder Co.*, 205 Ill. 217. While it is contended that to close a street or alley upon the payment of a consideration by those who will be benefited "is the modern tendency," such proceedings have never had the sanction of the courts of this State and have been frequently condemned as intolerable in many other jurisdictions. See cases cited above, also: *Louisville v. Bannan*, 99 Ky. 74; *Hammer v. Elizabeth*, 67 N. J. L. 129. (6) But the city of St. Louis has no power to divest plaintiffs of their rights except by virtue of the law that existed when these

rights were acquired. *Glasgow v. St. Louis*, 15 Mo. App. 112; *Price v. Thompson*, 48 Mo. 361. The law provided how streets and alleys should be vacated at the time this dedication was made. This law was known as the Town Plat Act, which provided the manner in which maps and plats of cities, towns, villages and additions, both incorporated and unincorporated, should be filed. G. S. 1866, chap. 44, sec. 8; R. S. 1879, sec. 6573; R. S. 1909, sec. 10294. This alley was dedicated to the public at the time it lay outside of the city limits of St. Louis and the title vested in the county of St. Louis "for the use and purpose aforesaid and none other." *Cameron v. Stephenson*, 69 Mo. 373. The rights of respondents did not come through the exercise of the power of eminent domain by the city, but came through grant, and the city is without authority to deprive the respondents of these rights in any manner except as provided by law at the time these rights vested. *Price v. Thompson*, 48 Mo. 361; *Warren v. Lyons City*, 22 Iowa, 355; *Railway v. Portland*, 14 Ore. 196; *Ruthford v. Taylor*, 38 Mo. 315; *Cummings v. St. Louis*, 90 Mo. 259.

WOODSON, J.—The plaintiff, the Kingshighway Supply Company, the owner of certain real estate situate in City Block No. 4095, fronting on Kingshighway, and the Union Sand & Material Company, its lessee, brought this suit in the circuit court of the city of St. Louis, against the Banner Iron Works and Ernest C. F. Koken, trustee, also owners of property in said City Block 4095, and the city of St. Louis, to secure a decree nullifying an ordinance of said city, known as Ordinance No. 26203, vacating a portion of the north-and-south alley which runs partly through said block.

The trial resulted in a decree in favor of the plaintiff, adjudging the ordinance void, enjoined the de-

fendants from closing the alley, and commanding them to remove all obstructions they may have placed therein. From this judgment the defendants properly appealed the cause to this court.

The facts of the case are very well stated by counsel for respondent, in the following language:

"All of the properties of the parties hereto are located in City Block 4095. It came down from the common grantor, Henry Shaw. The property of plaintiffs was sold by Henry Shaw to Edwin Berger in 1854; the plat thereof showing its subdivision into lots was recorded in 1855. The property of defendants in the same city block was sold by Henry Shaw to Francis Cooney in 1842, and the same was platted and a strip on Shaw avenue and the alley involved in this suit was dedicated to the public forever in 1872. This was while the property lay outside of the limits of the city of St. Louis. The north line of Shaw's grant to Berger, which is now the property of plaintiffs, was the south line of Shaw's grant to Cooney, which is now the property of defendants. The alley in question extends from Shaw avenue south to this line, abutting the north line of plaintiffs' property, about 192 feet east of the east line of Kingshighway and 170 feet west of the west line of the St. Louis and Oak Hill Railroad.

"This alley is the only rear outlet to plaintiffs' property, which has an undisputed value of \$30,000. This alley was used as a means of egress and approach to the rear portion of plaintiffs' land for a period of over twenty-five years, and at times has been the only means of egress and approach to plaintiffs' property with wagons and teams. Ordinance number 26203 was designed to close that portion of the alley abutting plaintiffs' property and to turn the same over to defendants herein.

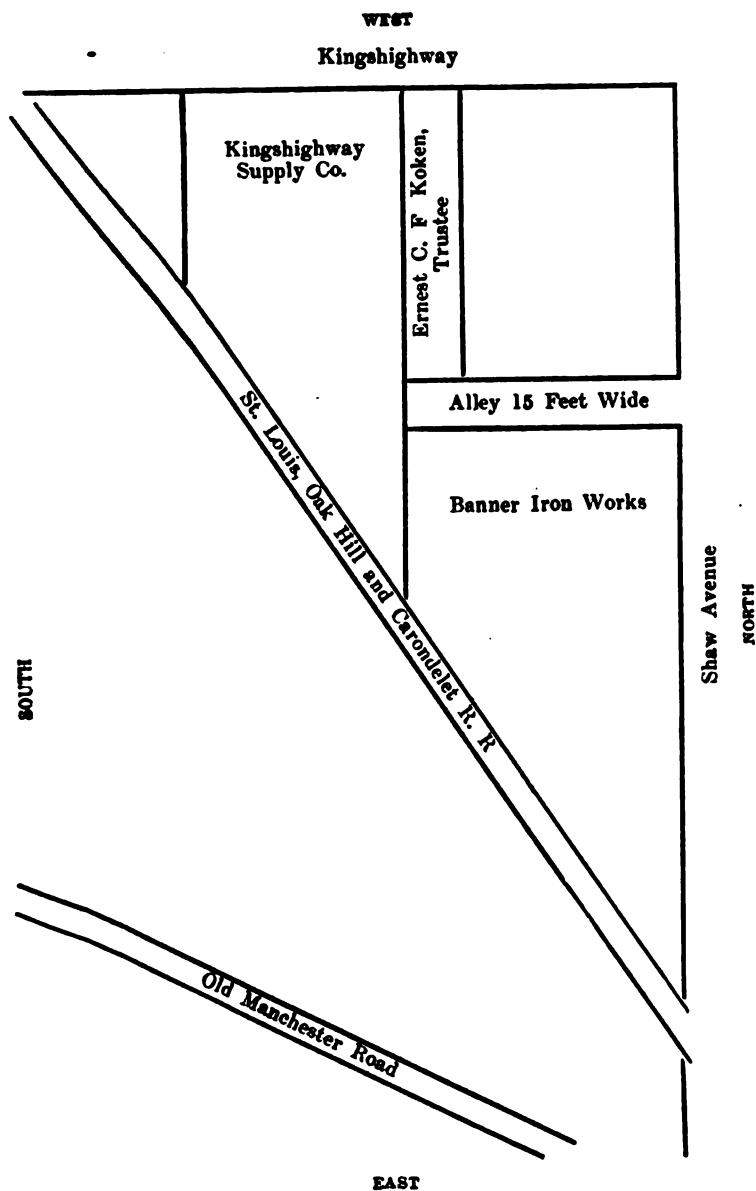
“The plaintiffs allege in their petition that the vacation of the alley upon which their property abuts serves no public purpose; that it was passed solely for the benefit of the Banner Iron Works; that it takes away plaintiffs’ only means of egress and approach to the rear portion of defendants’ property; that the rights acquired by the plaintiffs established a special easement in said alley through the grant in the original dedication, which cannot lawfully be taken away from them by the city of St. Louis in the manner in which this ordinance was passed; that the attempted passage of this ordinance deprives plaintiffs of their private rights to use this alley without any compensation; that the passage of this ordinance conditioned upon the payment of \$200 by the defendant is the attempted sale of public property and plaintiffs’ private rights therein to private individuals; that the closing of this alley would do the plaintiffs an irreparable injury for which they have no adequate remedy at law; that the ordinance is unjust, oppressive and unreasonable, and in contravention to plaintiffs’ constitutional rights.

“The answer, after a general denial, admits the dedication of the alley in question for public use and the filing of the survey and plat in the Recorder of Deeds’ office in the county of St. Louis; admits the passage of the ordinance and admits the payment by defendants of the consideration therein named of \$200, and pleads that upon the payment of said \$200 thereby said alley had been duly vacated. There is no affirmative plea that the plaintiffs were not abutting property owners to that portion of the alley closed.”

One of the disputed facts is that the respondents’ property abuts upon the alley proposed to be vacated.

The following plat will throw much light upon the questions involved:

Supply Co. v. Iron Works.



I. From the statement of the case it will be seen that the questions of fact and law presented by this record are embraced in a very narrow compass; and that the determination of the question of fact, as to whether or not the property of respondents fronts on the alley, practically disposes of the proposition of law here presented for adjudication.

Barring all constitutional questions, it goes without saying, that the city of St. Louis, under its charter, had the power and authority to enact the ordinance in question, and vacate the alley mentioned. [Former Charter of the City of St. Louis, sec. 26, paragraph 2 of article 3; and present Charter of said city, sec. 1, paragraph 14 of article 1; *Knapp, Stout & Co. v. St. Louis*, 153 Mo. 560; *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343; *Christian v. St. Louis*, 127 Mo. 109; *Heinrich v. St. Louis*, 125 Mo. 424; *Glasgow v. St. Louis*, 107 Mo. 198.]

As was said by this court in the case of *Gorman v. Railroad and the City of St. Louis*, 255 Mo. 483, "This power [of the city] is full and complete; constituting the city the sole judge when the streets shall be opened or closed for public travel, subject, however, to the constitutional inhibition against taking or damaging private property for public use."

We will, therefore, pass this question, as having been fully settled by the repeated decisions of this court.

II. The next question presented is, does the proposition of the respondent abut upon the alley mentioned within the legal significance of that term?

Counsel for respondents cite and rely upon the following authorities as supporting the affirmation of this proposition: *Corby v. Chicago, Rock Island &*

What is
Abutting
Property?

Pacific Ry. Co., 150 Mo. 457; Faust v. Hope, 132 Mo. App. 287; Dries v. St. Joseph, 98 Mo. App. 611.

I am perfectly familiar with these cases, having tried the first and last while one of the circuit judges at St. Joseph.

In all three of those cases the property of the respective plaintiffs abutted the alley mentioned, that is, they ran back to and the rear ends thereof fronted upon the sides of the alley, and not at the end thereof, as does the property in this case. For that reason they are not in point here.

Upon the other hand, counsel for appellants cite us to the case of Friscoville Realty Co. v. Police Jury, 127 La. 318, as sustaining the proposition that property situate at the end of an alley is not an abutting property within the meaning of the law. In discussing this question the Supreme Court of Louisiana, in that case said:

“The sugar refinery is not an abutting owner is one of the plaintiff’s grounds.

“This is another ground fatal to the defense.

“In considering this point, we noted that the sugar refinery’s property (one of the petitioners) is at the end and not along the road.

“It follows that its owners have no interest in any part of the public road over which it is the contemplation to locate the car line. As we read the statute before cited, the owners of property have the right to sign, as they are the owners of one-half the abutting road; not so with the sugar refinery.”

In our opinion that case announces the proper doctrine in such cases, and if followed by this court, then the respondent has no right, title or interest in or to the alley in question; and would, therefore, if the alley is vacated, sustain only such damages as are common with the public generally.

Before the respondents are entitled to the relief prayed they must plead and prove that they are spe-

cial and peculiar damages different from those sustained in common with the public generally. [Cummings Realty & Investment Co. v. Deere & Co., 208 Mo. 66; Knapp, Stout & Co. v. St. Louis, supra; Knapp, Stout & Co. v. St. Louis, supra; Glasgow v. St. Louis, supra.]

The ruling of the Supreme Court of Louisiana in the case mentioned is in harmony with the general statutes and adjudged cases of this State, in this: That when petitions are to be signed and presented for street improvements and tax-bills are issued in payment for such improvements, only such property-owners who own property fronting on the side lines of the street or alley can legally sign such a petition, and only such property, in the absence of an express statute to the contrary, which fronts upon the side lines of the street or alley is chargeable with the cost of such improvements.

I know of no adjudication to the contrary. But if counsel for respondents are correct in their contention that their land abuts the alley in question, then unquestionably the owners thereof might lawfully petition for the improvement of the same, and if improved their property would be taxable to pay for said improvements.

And suppose respondents' said property is taxable for all improvements which should be made in said alley, then by what rule should their proportional part of the cost thereof be ascertained and determined, to say nothing of the city's constitutional power to tax it for special benefits.

Clearly there is no such rule.

Moreover, it is the settled law of this State, in the absence of an express statute to the contrary, that the abutting property fronting upon the side lines of a street or alley is taxable for the entire cost of the construction, and each piece of property is taxable in proportion to its frontage thereon, which, of course,

would leave no sum whatever, to be taxed to the property abutting upon the end of a street or alley.

For the reasons stated, we are clearly of the opinion that respondents are not entitled to the relief prayed; and we, therefore, reverse the judgment and remand the cause with directions to the circuit court to dismiss respondents' bill. All concur.

WILLIAM LEAVEA v. SOUTHERN RAILWAY
COMPANY, Appellant.

Division One, December 2, 1915.

WITNESS: Competency: Tort: Death of Tortfeasor. Section 6354, Revised Statutes 1909, declaring that where one of the original parties to a cause of action in issue and on trial is dead, the other party to such cause of action shall not be admitted to testify, applies to actions *ex delicto*; and, therefore, where plaintiff sues a railroad company to recover damages on account of personal injuries claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment, and thereby created the cause of action, and said agent is dead at the time of the trial, the plaintiff is not permitted under the statute to detail in evidence his version of the controversy and the assault made upon him. [Approving *Leavea v. Southern Railroad Co.*, 171 Mo. App. 24, and disapproving *Drew v. Wabash Ry. Co.*, 129 Mo. App. 459.]

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

REVERSED AND REMANDED (*with directions*).

Samuel B. McPheeters for appellant.

Frank A. Thompson for respondent; *Guy A. Thompson* of counsel.

RAILEY, C.—Plaintiff brought suit in the circuit court of the city of St. Louis, Missouri, to recover damages on account of injuries, claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment. Since said assault, and before the trial in the circuit court, the alleged agent, Teague, departed this life.

Notwithstanding the prior death of Teague, who is charged with having made the assault and thus created the cause of action, plaintiff was permitted, over the objection and exception of defendant, to detail in evidence, at the trial, his version of the controversy and the assault made upon him. To the offer of this evidence concerning all that was said and done by Teague, defendant's alleged agent and watchman at the time, an objection and exception was interposed, on the ground that Teague, the other party to the transaction in issue and on trial, was dead. The trial court overruled said objection and permitted plaintiff to testify as to what was said and done between himself and Teague.

Upon the trial in the circuit court, the jury returned a verdict in favor of plaintiff for \$999, as compensatory damages, and \$1000 as exemplary damages, and judgment was entered accordingly. Defendant filed a motion for new trial and in arrest of judgment in due time. The trial court ordered a *remittitur* so as to reduce the compensatory damages to \$500 and the exemplary damages to same amount. Thereupon the court, after a *remittitur* was entered, rendered judgment for \$1000, and overruled defendant's motion for a new trial and in arrest of judgment. The case was duly appealed to the St. Louis Court of

Appeals, and the latter reversed and remanded the cause, on the ground that the trial court erred in permitting plaintiff to testify, over defendant's objection, to the transactions and conversations which occurred between himself and Teague, after the latter had died.

The opinion of the Court of Appeals was written by Judge NORTON, and concurred in by each of the other judges of said court. The latter, deeming the conclusion reached, to be in conflict with the opinion of Judge BROADDUS, in *Drew v. Wabash R. R. Co.*, 129 Mo. App. 459, on identically the same question, certified the case to this court, as provided by law under such circumstances. Counsel for appellant, at the oral argument of said cause here, announced with commendable fairness, that the only question before us was whether the *testimony* of plaintiff in regard to the transactions and conversations between himself and Teague, was *competent* under our statute.

The controversy is thus narrowed down to a construction of section 6354, Revised Statutes 1909, which reads as follows:

"No person shall be disqualified as a witness in any civil suit . . .; Provided, that in actions where one of the original parties to the contract *or cause of action in issue and on trial* is dead, or is shown to the court to be insane, the other party to such contract *or cause of action* shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him."

We have carefully examined the opinion of Judge BROADDUS in the *Drew* case *supra*, in connection with many other authorities in respect to the same subject, and have been unable to reach the conclusion, that the disqualification called for in the above section of our statute does not apply in actions *ex delicto*. We can conceive of no good reason for applying the provisions of said section to actions upon contract, which

would not apply with equal force to circumstances like those in the case at bar. We are therefore of the opinion, that the Drew case does not properly declare the law in respect to the foregoing matter and should not be followed.

The opinion of the St. Louis Court of Appeals herein, is reported in 171 Mo. App. 24 et seq. It contains a full statement of the case and presents an able review of the principles of law in regard to the matter under consideration. The conclusion reached by the above court, in its treatment and disposition of this cause, is accordingly affirmed.

In the recent case of *Eaton v. Cates*, 175 S. W. l. c. 953, we construed section 6354, supra, in accordance with the views of the St. Louis Court of Appeals supra. Cogent reasons for observing the above construction of said section of our statute will be found discussed in *Chandler v. Hedrick*, 187 Mo. App. l. c. 670; *Diggs v. Henson*, 181 Mo. App. 34; *Bone v. Friday*, 180 Mo. App. 577, 581; *Taylor v. George*, 176 Mo. App. l. c. 222-3; *Leavea v. Railroad*, 171 Mo. App. l. c. 27; *Lieber v. Lieber*, 239 Mo. 1; *Williams v. Edwards*, 94 Mo. 447, as well as other cases in this State.

The judgment of the St. Louis Court of Appeals is therefore affirmed, and the cause reversed and remanded with directions to the circuit court to proceed with the case in accordance with the views here expressed.

Brown, C., not sitting.

PER CURIAM.—The foregoing opinion of *RANLEY, C.*, is hereby adopted as the opinion of the court. All of the judges concur.

**CORA SELLS v. ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY, Appellant.****Division One, December 2, 1915.**

1. **PARTY TO ACTION: Against Interstate Carrier: Negligent Death of Employee: Wife or Administratrix.** An action for damages for the negligent killing of an employee of a railroad company engaged, at the very instant of his negligent injury in this State, in interstate commerce, should, in view of the Employers' Liability Act of Congress, be brought by decedent's legal representative, and cannot be maintained by his widow in her individual name under section 5425, Revised Statutes 1909. The action does not accrue to her as an individual, but accrues to decedent's legal representative.
2. ———: ———: ———: ———: **Waiver: By Failure to Plead.** Nor did the railroad company waive the point that the action for damages was wrongfully brought in the widow's individual name, instead of in her representative capacity, as decedent's administratrix, by failing to plead the Federal Employers' Liability Act in bar to the action, or by proceeding to trial as if the action had been properly brought and prosecuted under the State statute, if the petition alleged the railroad company was an intrastate carrier, and the answer was, among other pleas, a general denial, for such an answer raised the issue of the company's intrastate character.
3. **PLEADING: Office of General Denial.** Under the Code of Missouri the function of a general denial is simply to put in issue the facts pleaded in the petition, not the liability.
4. ———: ———: **Corporation: Pleading Under Oath.** A charge in the petition that defendant is a corporation is taken as true, unless defendant denies the same under oath. But an answer unaccompanied by such oath admits only the defendant's corporate existence; it does not admit the character of the corporation, such, for instance, that it is an intrastate carrier.
5. **PARTY TO ACTION: Against Interstate Carrier: Scope of Federal Employers' Liability Act.** The Employers' Liability Act of Congress completely covered the subject of the liability of an interstate carrier to its employees, and superseded all State statutes on the subject; and as it provides that an action for the negligent killing of such an employee accrues to his legal representative, the State statute, authorizing such action to be brought by his widow, is no longer operative, but as to interstate carriers has been *pro tanto* repealed by the exercise by Congress of its constitutional power to regulate commerce among the States.

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6. ———: ———: ———: **Waiver.** Nor can such superior power of Congress be waived, for said Employers' Liability Act gives to the legal representative of the negligently killed employee of the interstate carrier a cause of action, and the undisputed facts being that defendant is an interstate carrier, a petition alleging it to be an intrastate carrier states no cause of action under superseded section 5425, Revised Statutes 1909. *Held*, by GRAVES, J., concurring, that the right of the widow to recover damages for the negligent killing of her husband is purely statutory, and is given her by the State statute; but the Employers' Liability Act of Congress, as to interstate carriers and their employees, superseded and *pro tanto* repealed that statute, and left to the widow no cause of action, but declared such cause of action should accrue to his legal representative; and therefore a petition which alleges defendant railroad company was an intrastate carrier and names her, as his widow, in her individual capacity, as plaintiff, states no cause of action, when it is shown that defendant is an interstate carrier.
7. ———: ———: ———: ———: **Raised by Demurrer, Etc.** Whenever a petition fails to state facts sufficient to constitute a cause of action under the law, that vice may be taken advantage of by demurrer, or objection to the introduction of testimony, or by any other appropriate plea filed at any time in any court in which the case is pending.
8. ———: ———: **Federal Employers' Liability Act: Not Pledged: Waiver.** Nor does the interstate defendant waive the supremacy of the Federal Employers' Liability Act and its control of the suit for damages for the negligent killing of its employee, by not pleading it and by trying the case as if properly brought and prosecuted under the State statute, for the reason such act is a public act, of which all courts must take judicial notice, and being such it is not necessary to plead it, and for the further reason that the act having superseded the State statute on the subject, no cause of action exists without it.
9. ———: ———: ———: **Waiver: Pleading Contributory Negligence.** The plea of contributory negligence by the interstate carrier is not inconsistent with the Employers' Liability Act of Congress. Under it contributory negligence can be shown in mitigation of damages, and therefore must be pleaded; while under the State statute contributory negligence is a defense.
10. ———: ———: ———: **Change in Pleading.** It was not the design of the Federal Employers' Liability Act to change the principles and forms of pleading, especially where the case is brought under that act in a State court.

Appeal from Carroll Circuit Court.—*Hon. Francis H. Trimble*, Judge.

REVERSED AND REMANDED (*with directions*).

Thomas R. Morrow, George J. Mercereau, John H. Lathrop and Jones & Conkling for appellant.

This suit was improperly brought. If a cause of action accrued against the defendant, it accrued in favor of the legal representative of the deceased under the Federal Employers' Liability Act. *Thompson v. Railroad*, 262 Mo. 468; *Moliter v. Railroad*, 180 Mo. App. 84; *Rich v. Railroad*, 166 Mo. App. 379; *Railroad v. Vreeland*, 227 U. S. 59; *Second Employers' Liability Cases*, 223 U. S. 1; *Railroad v. Hesterly*, 228 U. S. 702; *Oliver v. Railroad*, 196 Fed. 432.

L. H. Woodyard and Busby & Withers for respondent.

The Federal question was waived. The defendant not only failed to set up the Federal Employers' Liability Act at any time in the trial court, or in any wise call the trial court's attention to the same, but joined issue with the plaintiff and tried the case throughout under the State law, and to permit the defendant to set up the Federal act for the first time in this court would be against the rule of appellate procedure that a case will not be reversed because of error not called to the attention of the trial court, and that a party will not be permitted to try his case upon one theory below and upon a different theory above; and, although the Federal act may have been applicable, had it been properly set up in the trial court, it should be held that the defendant has waived the question in this court by its conduct below. It is true that the defendant objected to the introduction of any evidence; also tendered a demurrer to plaintiff's evidence in

chief; also at the close of all the evidence asked a peremptory instruction that the plaintiff was not entitled to recover; also in its motion for new trial alleged as error the overruling of defendant's objection to the introduction of any evidence and the overruling of its demurrer to the evidence, and in refusing its peremptory instruction, and also in its motion in arrest of judgment alleged that the court had no jurisdiction to try the cause or of the cause of action, and that upon the entire record plaintiff was not entitled to recover, and that plaintiff's petition did not state facts sufficient to constitute a cause of action; but these were simply the ordinary and usual objections set up by a defendant in an action under the State law, and the defendant's objection therein to the jurisdiction of the court over the cause of action referred, or was understood by the court to refer, to the fact that the defendant had filed a petition to remove the cause to the Federal court because of the diversity of citizenship, which petition had been overruled. The objection to the jurisdiction of the court could not be understood to refer to the Federal Employers' Liability Act, as the court was given jurisdiction over the cause by the express provisions of that act, as well as by the State law. It is also true that for the purpose of proving that Train No. 6 was a fast train and not scheduled to stop between Carrollton and Marceline, the plaintiff proved by witness Geary that Train No. 6 was a "through train," and plaintiff also proved by the cross-examination of witness Witter that said train was a "through train" for the purpose of showing that it was a train upon which the lights were turned low about ten o'clock at night; and plaintiff also proved by the cross-examination of Witter and possibly other witnesses that said train was operated from Kansas City, Mo., to Shopton, Iowa, without an electric headlight, for the purpose of emphasizing negligence; and the defendant itself proved by witness Geary that

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Train No. 6 ran through Missouri, Iowa and Illinois; and defendant proved by witness Clancey that said train ran from Denver through Kansas City and across Illinois to Chicago, and the defendant also proved by its conductor, Montrose, that said train ran from Kansas City to Fort Madison, Iowa. But this proof was made by the defendant only in a casual way, without either the court or the plaintiff being at any time apprised of an intention on the part of defendant to set up any rights under the Federal act; and an examination of the record will disclose that the defendant never, at any time, mentioned or set up the applicability of the Federal act in the court below during the progress of the trial, nor in its motions for new trial or in arrest of judgment. The defendant not only failed to set up the Federal act, but its conduct in the court below was entirely inconsistent with any such claim. The plaintiff's petition was based solely on the second section of the Missouri Damage Act, and the defendant, in its answer, pleaded contributory negligence as a bar to the action, which plea was not permissible under the Federal act. The defendant also filed its petition to remove the cause to the Federal court, which removal was expressly prohibited by the Federal act, and the defendant renewed its plea of contributory negligence and also its right to remove the cause in its motions for new trial and in arrest of judgment; and the defendant also, by its objection to the introduction of evidence and its instructions to the jury, tried the case throughout as if contributory negligence on the part of the deceased was a complete bar to the action. It is clear from the record either that the defendant did not intend to claim any rights under the Federal act in the trial court, and that the claim now set up by it in this court for the first time is an afterthought, or else that it intended to conceal such defense from the trial court and the plaintiff until the case should be passed upon by the appellate court, when it

thought perhaps the rights of recovery under the Federal act would be barred by the two-year period of limitation provided in the Federal act. Had it been the intention of defendant's able attorneys to raise the question in the trial court they would have done so clearly, and the fact that they did not do so either in their answer, motion for new trial, or otherwise during the trial, shows conclusively that for one reason or the other it was not their intention to bring the question to the attention of the trial court, or have it consciously passed upon by the trial court. And inasmuch as the question was not brought to the attention of and consciously passed upon by the trial court, the defendant should not be permitted to raise the question for the first time in this court. It being clear that the question was never brought to the conscious attention of the trial court, this court, in permitting the defendant to raise the question at this time, would have to hold that the defendant may lie in ambush for the plaintiff and conceal its intended defense from the trial court and the plaintiff until the case reaches this court. Such a holding would be to say that the rules of procedure are snares and pitfalls, which holding this court will refuse to make. Whether the defendant and the deceased were engaged in intrastate commerce, or interstate commerce, at the time of his death, was peculiarly within the knowledge of the defendant, and it should have plainly set up that defense in the trial court if it intended to make it. Had it set up the defense in the trial court, and brought it to the attention of the plaintiff, she could have amended the petition by making the personal representative of her husband's estate the party plaintiff, and proceeded under the Federal statute. *Railroad v. Wulf*, 226 U. S. 570. It will appear from the following cases that under the great weight of authority the appellant cannot spring this question for the first time in this court:

Leora v. Railroad, 146 N. W. 522; Hahson v. Railroad, 146 N. W. 524; Graber v. Railroad, 150 N. W. 489; Bradbury v. Railroad, 128 N. W. 1; Pelton v. Railroad, 150 N. W. 242; Bitondo v. Railroad, 149 N. Y. S. 339; Mims v. Railroad, 85 S. E. 372; Railroad v. Rogers, 150 S. W. 283; Smith v. Railroad, 140 Pac. 685; Railroad v. Woodford, 153 S. W. 727; Railroad v. Woodford, 154 S. W. 1083; Railroad v. Woodford, 34 U. S. Sup. Ct. Rep. 739; Fleming v. Railroad, 76 S. E. 212.

WOODSON, J.—The respondent instituted this suit in the circuit court of Carroll county under the second section of the Damage Act, to recover the sum of \$10,000, damages sustained by her through the alleged unlawful and negligent conduct of the appellant in killing her husband, John Sells, an employee of the company.

The petition was in the usual form, alleging that the appellant road was an intrastate carrier, and the answer contained a general denial, a plea of contributory negligence and an assumption of risk.

The trial before the court and jury resulted in a verdict and judgment in favor of the respondent for the sum of \$8,000.

In due time and in proper form the appellant appealed the cause to this court.

The appellant's evidence tended to show the following facts:

That while the pleadings did not disclose the fact, yet the evidence showed that the appellant was an interstate railroad, and was actually engaged in the transportation of interstate commerce at the very instant the husband of respondent was struck and killed by appellant's Train No. 6, which was bound from Kansas City, Missouri, to Chicago, Illinois; nor was there any evidence introduced to the contrary.

In fact the evidence of both parties conclusively shows that the road was an interstate carrier.

John Sells and the respondent were, at the time of the injury, husband and wife, and he was about twenty-two years of age and possessed of all of his faculties. He was an employee of the appellant as a night watchman or track walker in the vicinity in which he was killed. It was his duty to walk over the track of appellant after each train passed, to see that it and the roadbed were all right before the next train came; and he had been engaged in that work for a period of about eight months before the date of his death, which was on the night of October 15, 1911. He usually went on duty about seven-thirty o'clock in the evening and remained until daylight the next morning. His home was at Dean Lake, the first station on appellant's road east of the town of Bosworth.

On October 15, 1911, about seven-thirty p. m., he left his home at Dean Lake, taking with him a bucket containing his midnight lunch. He was not seen alive again. There was no eye-witness to the accident that resulted in his death. The following morning his body was found at what is known as the "Kirker Crossing." This crossing is about two miles northeast of Bosworth and about four or four and one-half miles west of Dean Lake. The Kirker Crossing is a public wagon road crossing running north and south across defendant's railroad tracks, which runs in a northeasterly and southwesterly direction. The body of plaintiff's husband, when found, was lying about six feet north of the railroad track and about fifteen or twenty feet west of the wagon track. His hat was lying fifteen or twenty feet northeast of his body; his dinner bucket, about twenty feet east of him and north of his hat. It was the custom of plaintiff's husband to carry with him two lanterns—one white, the other red. These he had with him when he left home the evening of the 15th to go on duty. The following morning, when his body was

found, the white lantern was sitting on the cattle guard a little west of the center and leaning against the wing fence. The red one was sitting at the end of the cattle guard, right at the end of the wing fence. An examination of deceased showed that his skull was broken on the right side of the head near the temple and his left hip was bruised.

Deceased was familiar with the different trains passing over defendant's railroad, as well as with the time cards and schedules of the trains. In fact, he had a time card of his own which familiarized him with the running time of the trains.

Just west of the road crossing were the cattle guards and wing fences. The wing fence had recently been painted white. It had rained somewhat the night previous. An examination of the fence the next morning when the body of deceased was found, showed footprints of mud on the bottom boards, while white paint corresponding in color and appearance with the paint on the fence was found on the seat of deceased's trousers, indicating that he had been sitting on the wing fence.

From the Kirker Crossing where the body of deceased was found the railroad track west, for a distance of about one thousand feet, was straight and the view unobstructed.

Train No. 6, the one which struck and killed deceased, was an east-bound passenger train running from Kansas City to Chicago. Its Kansas City leaving-time was seven-thirty p. m. and it left Kansas City on or about schedule time on the evening of the 15th. Between Kansas City and Kirker Crossing it had lost considerable time. If it had been running on schedule time, it would have passed Bosworth at ten-fifteen, but on the night in question it did not pass Bosworth until 11:49; and Kirker Crossing at 11:52 or 11:53.

At or near Sheffield, which, in fact, is at the eastern edge of Kansas City, something went wrong with

the electric headlight on the engine. The employees in charge of the train being unable to repair it, placed a railroad lantern in the headlight cage, in front of the reflector, which, some of the evidence for the appellant tended to show, illuminated the track some forty or fifty feet, while most of that for the respondent tended to show that it did not illuminate the track but for a few feet, and two or three of her witnesses testified that the lantern was not burning at the time of the injury. A number of the coach lights were burning all the time and their light reflected out of the windows. The train was also provided with markers at the rear end, being red and green lights, which projected out six or eight inches from the coaches.

Upon the other hand the engineer, brakeman and conductor all testified that the lantern was continuously in the headlight cage and burning until the train reached Ft. Madison, Iowa. Not only that, but the night operators at Bosworth, Dean Lake and Marceline all testified to the fact that the lantern was in the headlight cage and burning as the train passed through these several stations.

At Floyd, a station on defendant's road, Montrose and Clancy, conductor and engineer, respectively, in charge of the train, wired to the dispatcher's office: "Headlight on Engine 557 out of order; running with a lantern for headlight."

The appellant's evidence tended to show that the engine bell was ringing when the Kirker Crossing was reached and crossed and had been since the train left Kansas City. That engine was equipped with an automatic bell, provided with air-bell power and when set to ringing, it continues to ring until the air valve is shut off.

The evidence tended to show that a person at the Kirker Crossing seated on the wing fence could have seen the light from the lantern in the headlight cage

on the approaching train as far as the track was straight—a quarter of a mile west.

A person who was seated on the wing fence, as indicated by the mud prints and disturbed paint, in a leaning or stooping posture, would be struck on the head by the pilot on the engine.

The evidence for the respondent was substantially as follows:

That on the morning of October 16th, mud, apparently off of the feet of the deceased, was found on the cattle guards and also on the lower board of the wing fence; also that white paint or whitewash off of the newly-painted wing fence was found on the seat of his trousers, and signs of his having sat on the fence were found near the middle of the second board thereof; also that a small lunch can, carried in his lunch basket, was found empty, or partly empty, with his white lantern, sitting on the cattle guard near the center of the wing fence, and a spoon, broken dishes, food and bread crusts were found strewn along a disturbance of the earth and cinders.

Leland Jones and Harry Crispin testified that they drove over the Kirker Crossing at about twelve o'clock that night (just after an east-bound train had passed, the headlight and crossing signals of which Jones could not see or hear), and that they saw deceased's burning lanterns sitting where they were found the next morning, but did not see the deceased, and that Jones's horse shied around some object lying east of the wing fence and just west of the traveled road (evidently Sells's body) where the body was found lying the next morning. The deceased's body was cold and stiff at nine o'clock next morning when found.

The testimony of witness Geary and other witnesses shows that the distance from Bosworth to Dean Lake is 6.2 miles; and the testimony of witness Humpston, and the operator's train register kept by him, show that Train No. 6, on the night of October 15, 1911,

passed Bosworth at 11:49 o'clock p. m. and Dean Lake at 11:58 o'clock p. m., thus running six miles in nine minutes, and therefore at the rate of forty miles an hour at the time it struck and killed the deceased.

The testimony of witness Geary and other witnesses shows that Train No. 6 was due at Bosworth, according to its regular schedule time, at 10:15 o'clock p. m., and at Dean Lake at 10:27 o'clock p. m., and the operator's train register shows that train No. 6, on the night of October 15, 1911, passed Bosworth at 11:49 o'clock p. m. and Dean Lake at 11:58 o'clock p. m., being more than an hour and a half late at the time it struck and killed the deceased.

The engineer, Clancy, testified that there was no whistling post west of the crossing, excepting one on the south side of the south track at least forty feet south of a train on the north track, and that the lantern headlight, even if burning, would not illuminate the sides of the track to exceed five to twelve feet, nor far enough to show a whistling post located forty feet from the track, and also that there were no whistling posts at the two curves west of the crossing, and that these were very slight curves in the track. He gave as the reason for knowing that he sounded the crossing whistle on this dark, stormy night, the fact that a whistling post was located on the north track west of the crossing.

Sam Sparkman, an engineer, testified that a brakeman's lantern sitting on the extension of a headlight cage out in front of the reflector would make only a faint light with no material reflection, and would not illuminate the sides of the track sufficiently to disclose the location of a whistling post, especially a post located on the south side of the south track forty feet from the side of the engine.

Witness Lathem, Lou Keenan and Frank Dodd testified that the north- or west-bound track which deceased was watching and upon which he was killed was

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a new track, and that the south- or east-bound track was the old track at the Kirker Crossing; that east-bound trains were then temporarily using the north track, but that there was not then and never has been a whistling post located on the north track west of the crossing, the only whistling post on the west side of the crossing being the one eighty rods west of the crossing on the south side of the south- or east-bound track, and at least forty feet south of the north track.

Leland Jones testified that he had resided within three-fourths of a mile of the Kirker Crossing and had traveled over it for twenty-one or twenty-two years; that as he approached the crossing in a buggy between 11:30 and 12 o'clock on the night of Sells's death he saw an east-bound passenger train, but did not hear anything of it until he was right on the crossing, and the train was then right in front of him; that he was in position to see and hear, and if any crossing signals with whistle or bell were given for the Kirker Crossing he did not hear them. It also appears from this witness's testimony that he returned to the crossing the next morning before the body of Sells was removed.

It was further shown by the witnesses that on the night of Sells's death it was raining, storming and thundering, and that the wind at 12 o'clock that night at Dean Lake and at the Kirker Crossing was blowing from the east or northeast.

It is also undisputed that the deceased possessed good eyesight and good hearing, was strong and capable, and a careful and trusted employee of the defendant.

That the noise of the train was not sufficient to enable the deceased, in the exercise of ordinary care, to know of the approach of the train in time to reach a place of safety.

It was proven that the track upon which deceased was killed was down grade twenty-five feet to the mile, or one-half of one per cent down grade, for a distance

of one and one-half miles approaching the Kirker Crossing from the west.

Witness Coney, an engineer, testified that a passenger train such as No. 6, running at the rate of forty miles per hour on a down grade twenty-five feet to the mile, would not be working steam and would make very little noise, and that the direction of the wind would materially affect the power of one on the track to hear the train.

Charles Bowlby, an engineer, testified that a train such as No. 6, running on a down grade of one-half of one per cent with steam shut off, would make very little noise, as compared with an engine working steam, and with the wind in the opposite direction from the train it would not be heard by one on the track until within 150 or 175 feet.

In a test made by witness Lathem, while he was stationed near the wing fence at the Kirker Crossing, and while especially listening for the purpose, and with the electric headlight brightly burning, and without an unfavorable wind, he ascertained that one at the crossing could not hear the noise or rattle of two east-bound passenger trains until such trains were within 300 to 400 feet of the crossing; and that if running at the rate of forty miles per hour a train would run the 400 feet in 6.8 seconds and the 300 feet in about 5 seconds.

In a test made by witness Cook while he was stationed at the wing fence at the Kirker Crossing and especially listening for the purpose, and with the electric headlight burning brightly and without an unfavorable wind, he ascertained that two east-bound passenger trains could not be heard until within 300 feet of the crossing.

Dennis Smart, a fireman, testified that a passenger train such as No. 6, running on a down grade twenty-five feet to the mile with the steam off and the train drifting, and with the wind in the opposite direction, would get within 150 to 200 feet of one at the crossing

before it would be heard; that seventy-five per cent of the usual noise of such a train would be eliminated under such circumstances.

Sam Sparkman, an engineer, testified that a passenger train such as No. 6, running on a down grade twenty-five feet to the mile, with the steam shut off, while it was running, and with the wind in the opposite direction, and without other warning of its approach, would get within 150 feet of one at the crossing, or strike him before he would hear it; about seventy-five per cent of the usual noise of the train would be eliminated under such circumstances.

Lou Keenan testified that while approaching this same Kirker Crossing in a wagon in the daytime one of the defendant's east-bound trains got within 100 feet of him before he heard it.

George O. Manson, section foreman, testified that he lived one-half mile southwest of the Kirker Crossing; that the track was down grade from Bosworth to the Kirker Crossing, and admitted that when trains are running on that down grade the exhaust of the engine is shut off and they make very little noise, and that it was a rainy evening on the night of Sells's death.

John Clancy, the engineer in charge of Train No. 6, admitted that the steam was shut off of the engine and the train drifting on the down grade for a distance of one and one-fourth miles west of the Kirker Crossing, and that the train drifted, that is, ran entirely of its own momentum, without the engine laboring, from that time until it passed the crossing.

Lawson Witter, the fireman on Train No. 6, admitted that the steam on the engine was shut off when the train tipped over the hill one and one-fourth miles west of the Kirker Crossing, and that the train drifted, that is, ran entirely of its own momentum, without the engine laboring, from that time until after it passed the crossing.

Frank Roff, bridge inspector for defendant, testified that an engine exhausting steam and laboring makes a great deal more noise than when drifting; that a train running on a down grade twenty-five feet to the mile, with the steam shut off, would make a great deal less noise than when running on a level track; and that if the wind were in the opposite direction it would tend to drive away the noise of the train.

That all the passenger and freight trains on defendant's road were equipped with strong electric headlights which he could have seen for many miles on a straight track, and which on a train approaching from the west would have reflected about him and on the trees and objects in front of him when the train was as far away as one-half or three-fourths of a mile west of the crossing; that it was very unusual for a train on defendant's road to operate without such electric headlight; and that by reason of these facts he was probably lulled into a sense of security and led to believe that no train was approaching until it was right on him, in the absence of any reflection from a headlight.

That Train No. 6, which struck Sells, was more than an hour and a half late, and he had no means of knowing of the time of its approach excepting by the headlight or other sufficient warning.

Notations or entries made at the time in the regular course of business on the train sheet in the train dispatcher's office at Marceline stated that Train No. 6, on the night of October 15, 1911, lost seventeen minutes of time on the Second District, that is, between Kansas City and Marceline, on account of "no headlight."

Witnesses Arthur Lawson, Squire Lynn and Ed Stevens testified that they saw an east-bound passenger train go through Dean Lake, only about three and one-half miles east of where Sells was killed, at about 12 o'clock on the night of Sells's death, without any head-

light at all, lighted or burning, in front of the engine.

Dennis Smart, a fireman, testified that the light in a brakeman's lantern, even if burning, is smaller than in an ordinary lantern, and sitting on an extension of the headlight cage out in front of the reflector, it would not cast any reflection ahead and would be very deceptive and not resemble in appearance either an electric or regular oil headlight on a train; that until the train got close enough, say within fifty feet, for one to see both the lantern in the cage and the track below, he could not tell whether the light was twelve or three feet above the track; and that the engineer and fireman on Train No. 6 doubtless put the lantern in the cage more to protect themselves from the company than for the purpose of illuminating the track.

Sam Sparkman, an engineer, testified that a brakeman's lantern set on the extension of the headlight cage, out in front of the reflector, would make only a faint light with no material reflection, and would not illuminate the track more than fifteen or twenty feet ahead of the pilot; that the bottom of both the cage extension and the lantern are round and circular, so that the lantern would in a manner set on a pivot and soon tip or turn over from the jostling and jerking movement of the engine; that such a light, even if burning, would be very deceptive and have the appearance of some one on the track with a lantern, as one could not judge the height of it above the track in the darkness, and that the witness, in his experience, had found that such a lantern hung in front of an engine or put in the headlight cage would soon go out.

Witness Coney, an engineer, testified that one on a straight track could see one of the electric headlights in use on the Santa Fe when burning ten miles distant, and that the reflection from it would be upon and around one on the track when the train was three-fourths of a mile distant.

Charles Bowlby, an engineer, testified that a brakeman's lantern sitting on the extension of the headlight cage in front of the reflector would not cast any reflection ahead of the train, and would not have the appearance to one on the track of an electric or regular oil headlight, or of an approaching train; and that the ability to see the lantern and markers would depend on the atmosphere.

Witness Mangle, agent for the defendant at Dean Lake, on the night of Sells's death, refused, on the advice of counsel for defendant, to answer the questions at the time of giving his deposition in the case whether he, in the line of duty, received a communication by telephone or telegraph from the defendant's agent at Bosworth on said night after Train No. 6 had passed Bosworth, and before it reached Dean Lake, with reference to the headlight on said train being out.

John Clancy, engineer on Train No. 6, admitted that the electric headlight failed at Sheffield, a suburb of Kansas City, and that he ran the train from Kansas City clear through Missouri to Shopton, Iowa, a distance of 208 miles, on a dark, stormy night, going through many towns and cities, and over on an average a public road crossing every mile, with only a brakeman's lantern sitting on the extension of the headlight cage, and illuminating the track not exceeding fifty feet ahead of the engine; that as his train approached the Kirker Crossing he was looking ahead, but did not see anyone at the crossing; and that the train lost seventeen minutes time running from Kansas City to Marcelline on account of the defective headlight.

Lawson Witter, the fireman on Train No. 6, testified that the electric headlight failed because of a defective dynamo between 15th street and Sheffield in Kansas City, and that without stopping the train he simply went out on the running board of the engine and set a brakeman's lantern on the extension of the headlight cage, without hooking or attaching the lantern to any-

thing; that there was a flat place on which to set the lantern, but that the cage extension was not made for the purpose of setting a lantern on it, and he had never before seen a flat place in such an extension and could not imagine any reason for it being there; that the lantern, if burning, would not illuminate the track farther than forty or fifty feet ahead of the engine; that the flame in a brakeman's lantern is smaller and not as bright as in a common lantern, and the metal top and bottom of the lantern would obstruct the reflection of the light and cast a shadow in front of the engine; and that all of the defendant's trains between Kansas City and Fort Madison used strong electric headlights and it was very unusual to run a train without such a headlight.

S. V. Montrose, the conductor on Train No. 6, admitted that Train No. 6 lost seventeen minutes between Kansas City and Marceline on the night of Sells's death because of a defective headlight.

The witnesses Lathem and Cook testified that in a test made by them while standing at the wing fence at the Kirker Crossing, and especially watching the approach of two passenger trains in the early part of a night when it was misting rain, and when all the coach lights were probably burning, the lights from the coaches could not be seen by them until the trains got even with them, that is, that one in the position of Sells directly in front of a passenger train cannot see the lights or the reflection of the lights from the coaches until the train comes up opposite him.

S. V. Montrose, the conductor on Train No. 6, testified that all the lights, thirty or forty in number, each in the chair car and smoking car, excepting only about twelve in each car, were turned out at ten o'clock at night; and it is and was known, of course, from common experience, that few lights were left burning in the remaining five or six sleeping cars on the train at the hour of twelve o'clock at night.

Judge Simpson testified that he sat down on the second board of the wing fence on the morning of October 16th in the place where Sells was supposed to have been sitting, and while he believed that the train would have cleared him (Simpson) when sitting erect, yet that his body would have been close to the train and required to move but slightly forward to be struck by the train, and other evidence in the record shows that one sitting upon the lower board of the fence would have been struck without moving forward.

At the commencement of the trial, defendant objected to the introduction of any evidence, upon the grounds, among others, that the petition did not state facts sufficient to constitute a cause of action and because the court had no jurisdiction over the cause.

Again, at the close of plaintiff's case, defendant tendered a demurrer to the evidence, which was overruled and an exception duly saved, and at the close of all the evidence in the case, defendant requested a peremptory instruction in the nature of a demurrer to the evidence, which was by the court refused, and appellant duly excepted.

At the close of all the evidence the court gave for the respondent eleven instructions covering all the issues of her case; and thereupon the appellant requested the court to give instructions numbered one to four inclusive, submitting the non-liability of defendant, contributory negligence and the assumption of risk, all of which were by the court given; and the court also, of its own motion, gave an instruction numbered three and one-half, defining ordinary care.

The appellant also requested the court to give instructions numbered five and six, which the court refused, as asked, but modified them in slight particulars and gave them as modified, to which action of the court the appellant duly excepted.

The court also, at the request of appellant, gave instructions numbered seven to nineteen, both inclu-

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sive, and refused instructions marked R, S, T, U, V, W, X, Y and Z, asked by appellant, making a total of twenty-eight instructions requested by the appellant.

I. It is first insisted by counsel for the appellant that the trial court erred in refusing its demurrer interposed at the close of respondent's evidence, and also at the close of all the evidence introduced in the case.

The ground of this insistence is predicated upon the fact that the undisputed evidence in the case conclusively shows that at the time of the injury and death of respondent's husband he was an employee of the appellant, a railroad company, engaged in interstate commerce, and that he was so employed and was performing his duties as such at the very instant of his injury and death; and that upon those facts the suit should have been brought by the respondent in her representative capacity, as administratrix, under the Federal Employers' Liability Act, and not in her individual name under section 5425, Revised Statutes 1909.

There can be no question but what this insistence of counsel for appellant is sound and wellfounded.

The identical question was presented to this court for decision in the case of *Thompson v. Wabash Ry. Co.*, 262 Mo. 468.

After a careful review of the authorities upon the question, especially the decisions of the Supreme Court of the United States upon the subject, which is the final arbiter in all such cases, it was unanimously held that the plaintiff in that case could not maintain such a suit in her individual capacity under the State statute mentioned, but should have brought it in her representative capacity under the Federal Employers' Liability Act, before mentioned.

It would be a useless waste of time, as well as a supererogation of labor, to again review those authorities here.

In fact I do not understand learned counsel for respondent to controvert the correctness of the legal proposition above announced and decided in the Thompson-Wabash case, but seek to evade its effect by the contention that counsel for the appellant waived the question there decided by failing to plead the Federal Employers' Liability Act in bar to this suit and by proceeding to the trial of the cause as though properly brought and prosecuted under the State statute.

We will consider this question of waiver in the next paragraph of this opinion.

II. Attending the question of waiver before mentioned: Counsel for respondent contend, first, that since the petition does not disclose the fact that the appellant's railroad was an interstate commerce road, and the answer having failed to plead that fact, the latter must be presumed to have waived that defense; and, second, because counsel for appellant throughout the trial of the cause proceeded upon the theory and conducted the defense as though the suit was properly brought and prosecuted by respondent in her individual capacity under the Missouri statute.

For convenience we will consider these two propositions in the order stated:

(a) Regarding the first: It is true the petition of respondent upon which the cause was tried, did not disclose the fact that the road of appellant was an interstate commerce line; but it is true it charged it was an intrastate road and it is also true the answer of appellant did not affirmatively allege that the road was an interstate road, yet it denied the charge of the petition that it was an intrastate line, for the reason the answer consisted of a general denial, a plea of

Capacity to Sue:
Waiver:
Plea of
General
Denial.

contributory negligence and an assumption of risk.

It should be borne in mind that the function of a general denial, under the code of this State, is simply to "put in issue the facts pleaded in the petition, not the liability." [Kelerher v. Henderson, 203 Mo. 498, l. c. 512; Musser v. Adler, 86 Mo. l. c. 449.]

The amended petition in this case in express terms alleges that the appellant was an intrastate carrier, in the following language:

"2nd. That defendant, The Atchison, Topeka & Santa Fe Railway Company, is and was on all dates herein mentioned, a railway corporation duly organized under the laws of the State of Kansas, having its domicile therein, and being a citizen and resident of said State of Kansas, and owning and operating a line of steam railway between the towns of Bosworth, Missouri, and Dean Lake, Missouri, and other points in this State."

That being true, the general denial of the answer, according to the well known rule announced in the Kelerher and Musser cases, *supra*, both in letter and spirit put in issue the intrastate character of the appellant road, as charged in the petition. In fact, I know of no other mode or manner by which that issue could have been so clearly and pointedly presented.

It should be remembered that section 1985, Revised Statutes 1909, which provides that when a defendant is sued as a corporation, and that fact is charged in the petition, such charge shall be taken as true unless the defendant denies the same under oath, has no application to the question here presented, namely, that the defendant company was an intrastate road. While the incorporation was admitted the character of the corporation was not admitted by the failure of the affidavit. But the question as to whether the road was an intrastate or an interstate carrier was one of fact which the plaintiff was required to

plead and prove, just as any other fact, by the evidence, which as before stated she wholly failed to do.

(b) Moreover, according to all of the decisions of the Supreme Court of the United States discussing this question, it is invariably held that when Congress enacted the Federal Employers' Liability Act, it in effect, *ipso jure*, absolutely repealed or wiped from the books all statutes of the various States regarding all subjects of interstate commerce covered by that act, principal among which are injuries done to the employees of interstate carriers.

Interstate
Commerce:
Congressional
Statute:
State Statute
Superseded.

In the case of *Thompson v. Wabash Railroad Co.*, 262 Mo. 468, 1. c. 480, this court in considering this precise question quoted largely from various opinions delivered by the Supreme Court of the United States, as will appear from the following quotation taken therefrom:

"In construing the act of Congress mentioned, the Supreme Court of the United States, in the case of *Michigan Central Railroad Company v. Vreeland*, 227 U. S. 1. c. 66, said:

"We may not piece out this act of Congress by resorting to the local statute of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States. [*Simon v. Southern Ry. Co.*, 236 U. S. 115, 1. c. 123.]

"Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample.

"The subject," as observed by this court in *Mondou v. Railroad*, 223 U. S. 1, 54, "is one which falls within the police power of the State in the absence of

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“ ‘It therefore follows that in respect of State legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States.’ In the Second Employers’ Liability Cases, 223 U. S. 1, the court said, l. c. 46:

“ ‘The principal questions in these cases as discussed at the bar and in the briefs, are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do these regulations supersede the laws of the States in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States, when their jurisdiction, as fixed by local laws, is adequate to the occasion?’

“ ‘Continuing on page 52 the court said regarding the question there:

“ ‘The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat. 316.’

“ ‘And on pages 54 and 55, the court said:

“ ‘True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the ab-

sence of action by Congress. . . . The inaction of Congress, however, in nowise affected its power over the subject. . . . And now that Congress has acted, the laws of the States in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.'

"In the opinion in *McCulloch v. Maryland*, referred to, 4 Wheat. 406, Mr. Justice MARSHALL said:

"The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." "

"Also in the case of *Gulf Ry. Co. v. Hefley*, 158 U. S. 98, the question being whether a statute of the State of Texas which was in conflict with the Interstate Commerce Act, had any force, the court said, l. c. 103:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the State law.'

"Continuing on page 104, the court further said:

"Generally it may be said in respect to laws of this character, that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the State, is subordinate to those in terms conferred by the Constitution upon the nation.'

"In the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, the question was whether or not a contract between plaintiff in error and defendant in error, the plaintiff below, limiting the shipper's recovery to

an agreed value, was invalid. The local law of the State was that such contract was invalid, and the shipper was entitled to recover the actual value. The shipment was an interstate shipment. The court held that the Act of Congress of June 29, 1906, controlled, saying, page 500:

“ ‘But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and non-feasance committed within its limits, although interstate commerce may be indirectly affected.’

“ ‘Mr. Justice LURTON, quoting, on page 505, said:

“ ‘The Congressional action has made an end to this diversity for the national law is paramount and supersedes all State laws as to the rights and liability and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the State Court’s obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them.’

“ ‘On the same page he further said:

“ ‘Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in

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such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist.'

"In the case of the State of Missouri v. Wabash Railroad Co., 238 Mo. 21, the defendant was proceeded against for a violation of sections 7818 and 7819, Revised Statutes 1909, regarding the hours of labor of railroad trainmen. The violation occurred in February, 1907. The evidence showed that the conductor who violated the statute was engaged in interstate commerce. There this court held that the same subjects were covered by the Act of Congress of March 4, 1907, regarding the hours of labor, and therefore our statutes on the same subject were abrogated. The language of this court was as follows:

" 'Consequently, in the case at bar, we are compelled to hold that, since the Act of Congress before mentioned covers the same subjects or classes of legislation that are covered by the Act of the Legislature of 1905, the former nullifies the latter as completely as if it had never been enacted.'

"And in Rich v. St. L. & S. F. R. R. Co., 166 Mo. App. 379, is a case exactly in point. There the widow of decedent sued under the State law. Defendant set up in its answer that the plaintiff could not maintain the suit because it arose under the Federal Employers' Liability Act, alleging the facts. On motion, the court struck out these allegations of the answer. The court speaking through NORTON, J., said, l. c. 389:

" ' "And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." ' This last quotation was from Smith v. Alabama, 124 U. S. 465.

"On page 390 the court said:

" 'It is, therefore, obvious that, though plaintiff did not declare upon the Employers' Liability Act, she nevertheless may not maintain this suit under our stat-

ute, for the right of recovery is given by the authority of Congress to the personal representative of her husband for the benefit of herself and his children. The court erred in striking out the portion of the answer above mentioned and in denying defendant the right to show the facts therein set forth.' ''

This court has upon two previous occasions been called upon to consider what effect the enactment of the Federal Employers' Liability Act had upon similar State statutes covering the same subject-matters, and upon each of those occasions this court followed the pronouncements of the Supreme Court of the United States, and by unanimous opinions held our statutes upon the subject had been absolutely wiped from existence, as completely so as if they had never been enacted or had been repealed by the Legislature of this State. [State v. Missouri Pacific Ry. Co., 212 Mo. 658; State ex rel. v. Wabash R. R. Co., supra.]

From these observations it must be perfectly clear to all that the petition stated no cause of action, under section 5425, Revised Statutes 1909, of this State, the one under which the petition shows it was brought, for the obvious reason that in so far as this class of cases is concerned, said statute was absolutely repealed or wiped out of existence by said act of Congress.

Under the familiar rule, that whenever the petition in a cause fails to state facts sufficient to constitute a cause of action under the law, that vice may be taken advantage of by demurrer or objection to the introduction of testimony or by any appropriate plea filed at any time in any and all courts in which the case may be pending and being heard.

This principle of law is so well settled it needs no citation of authorities to support it.

It might as well be contended, where a person is indicted for murder under a State statute, and he pleads not guilty, and after the evidence has all been introduced he should ask for a discharge because the

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statute had been previously repealed, that he has waived the right to insist upon the repeal; but if not, then insists that there is a statute of the United States in force which does cover the case, and therefore he should be convicted under the former, if waived, and under the latter if not waived. Such a position would be unsound, illogical and illegal.

For the reasons stated the trial court erred in refusing appellant's instructions in the nature of demurrers to plaintiff's evidence, and also to all of the evidence in the case.

This brings us to the consideration of the second reason assigned by counsel for respondent in support of their contention, that the appellant
**Waiver:
Conduct
at Trial.** waived its right to insist upon the fact that the respondent could not recover in this case because counsel for the latter had tried the case as having been properly brought and prosecuted under the State statute, and therefore should not be permitted to urge the fact that it should have been brought under the Federal Employers' Liability Act.

This contention is not tenable for several reasons:

First, for the reasons stated in subdivisions (a) and (b) of paragraph Two of this opinion.

Second. Because the act of Congress mentioned is a public act, and all courts must take judicial notice of its existence, as well as its repealing effect upon our statutes regarding this class of cases, and therefore it was not incumbent upon appellant to plead it.

Under the state of pleadings before mentioned the evidence introduced by both the respondent and appellant showing that the road of the latter was an interstate road and not an intrastate line was clearly admissible in evidence to contradict the charge in the petition that it was an intrastate road under the same rule that permitted the respondent to introduce evidence tending to show it was an intrastate road.

That is unquestionably true, for the reason it tended to disprove the charge in the petition that the road mentioned was an intrastate road and therefore the respondent was not entitled to a recovery under the proof in the case.

That being true, it can in no sense be logically contended that appellant thus exercising his legal rights was estopped or waived its right to insist that the cause should have been brought by respondent in her representative capacity under the United States Employers' Liability Act, and not in her individual capacity under the State Statute.

Third. Closely connected with the two previous matters considered under the second subdivision mentioned, is the plea of contributory negligence contained in the answer and the evidence introduced by appellant for the purpose of proving that plea.

This plea is not inconsistent with the act of Congress mentioned; nor does that act prohibit the introduction of evidence tending to prove that the employee was guilty of contributory negligence; but upon the contrary, the act expressly provides that contributory negligence may be shown, therefore must be alleged, not in bar, as under the State law, but in mitigation of the damages the plaintiff might otherwise be entitled to recover.

The answer in this case is substantially the same as was the one in the case of *Thompson v. Wabash Railroad Co.*, *supra*, and similar in character to the answers which have been uniformly filed in such cases in the courts of this State and those of the Federal courts sitting in this State, for many years prior to the passage of said act of Congress.

Clearly it was not the design of that act to change the principles and forms of pleadings in this class of cases, especially where the cases are to be brought under that act in the State courts.

Our own rules of pleadings must govern in all such cases, in the same manner as in cases arising under our State laws. Congress has no authority to make such a change. The difference consists in the legal effect the State law attaches to contributory negligence and that which is attached thereto by the Federal act.

Under our statute, as before stated, contributory negligence is a complete bar to any recovery in such cases; while under the Federal act, it may be shown for the purpose of mitigating the damages claimed.

For the reasons stated we are clearly of the opinion the appellant did not by pleading contributory negligence in this case, nor by offering evidence in support thereof, waive its right to invoke the Federal Employers' Liability Act as a bar to respondent's right to a recovery in this case.

III. Counsel for respondent cite many cases in support of their contention of waiver, principally from the courts of several of the States, but none directly in point from the Supreme Court of the United States.

But from the view we have taken of this case, and which we must take of it in the very nature of the thing, no good whatever could or would flow from a consideration of them. This is perfectly apparent for the reason previously stated, namely, that even though appellant did waive its right to insist upon Employers' Liability Act, yet in so far as this class of cases is concerned, that act completely repealed or wiped from existence section 5425, Revised Statutes 1909, the statute under which this suit was brought and prosecuted, and thereby left no law whatever in force, authorizing a recovery upon the facts proven by undisputed evidence.

The only law in existence which authorizes the respondent to a recovery for the matters complained of is found in the Federal Employers' Liability Act before mentioned.

Entertaining these views we are of the opinion that the judgment should be reversed and the cause remanded to the circuit court with directions to dismiss the case; and it is so ordered. *Graves, P. J.*, concurs in separate opinion; *Blair, J.*, concurs in the result; *Bond, J.*, dissents.

GRAVES, P. J. (concurring).—This case presents interesting questions and questions that should be well weighed. This action is under our State statute, and is by the widow in her own right. At common law she had no cause of action. Her action is therefore fully statutory. She must stand or fall under the provisions of our statute, because the Federal statute does not undertake to give to her an individual right of action. In her individual capacity she could not sue under the Federal statute. Starting with the proposition that the right to sue at all is purely statutory, let us see what is the status of plaintiff. Under the State law a right of action (one not theretofore recognized by the common law) was given to the widow of the deceased, upon condition as to time of bringing suit as set out in such statute. This right of action was one given to her, personally, and not a right of action given to the representative of the estate of the deceased. The Federal statute also creates a cause of action not recognized at common law, but it gives the right of action to the representative of the estate, and not to the widow or children in their personal rights. It requires no strain of imagination to see that the two statutes give different rights of action. In the one, the right is in the widow or children personally, and the other it is in the representative of the estate. This point is vital in this case.

It is settled doctrine that where a statute of the Federal Government is passed to and does cover a given field, then the fact of its passage operates as a practical repeal of State statutes upon the same sub-

ject. The State law is nullified as to all persons falling within the purview of the Federal act. LAMM, J., in a separate concurring opinion in the case of Thompson v. Railroad, 262 Mo. l. c. 490, aptly says:

"That when the Congress of the United States, under its constitutional power of regulating interstate commerce, has occupied the field by its statute, the State damage act must give way, *pro tanto*, where the two overlap in remedy, is not to be questioned for a moment. However much the State bench and bar may revere the old landmarks of our statute on damages, they must be willing to see that statute yield when the paramount authority of the Federal Government once takes over any phase of the regulation of interstate commerce and the liability of carriers in that line of business, as it has done in this instance."

Prior to the Federal act involved in this case the widow of a person belonging to the class to which plaintiff's deceased husband belonged had a statutory right of action. It was a right of action created by a State statute. This, however, did not prevent the Federal Government from passing a statute covering the field of persons injured while engaged in interstate business. The Federal Government saw fit to assert itself in the matter, and when it spoke, the right of action for one dying from injuries received while engaged in interstate commerce was given to the representative of the estate, and not to the widow or children personally. This statute of the Federal Government placed persons engaged in interstate commerce into a class to themselves and created a right of action in case of death. As to persons falling within the class, this Federal law took the place of all State statutes dealing with the same subject-matter. As to this class of persons it *pro tanto* repealed the State statutes. Such State statutes became as ineffective, both as to rights and remedies, as they would have been had they been specifically repealed by the State.

As to persons engaged in interstate commerce this Federal statute left no State law as to who might recover damages, or as to what extent, or under what conditions they could recover. It fully obliterates the State law. The cause of action being purely statutory, the plaintiff in this case was left without a cause of action at all when the Federal law was passed. The Federal law fully covered the field of liability, so far as the class to which plaintiff's husband belonged. Under the State statute she was then left no cause of action at all. She averred facts sufficient to make a cause of action under the State statute, but upon this the proof failed. Had she averred the fact that defendant was an interstate carrier, then the petition would have been subject to demurrer, and that being waived, there might have been a question of waiver in the case. We do not pass upon this question, however, because it is not a live issue here.

It is sufficient to say that plaintiff planted her cause of action upon a State statute, which as to her had been repealed by the Federal statute. The general denial interposed by defendant was sufficient to raise all questions of vitality here. Her petition averred a right of action under the State statute. The answer denied all the averments of the petition. When the Federal law dethroned her right of action as an individual, there was in fact no subject-matter to which jurisdiction could attach. Her individual right to sue had been repealed. The general denial raised the issue, and because the court forced a trial after objection made, cannot bind defendant either by waiver or otherwise.

It is unnecessary to try to review the cases from the United States Supreme Court. They are binding here, and we cannot distinguish this case from those cited in the majority opinion. With these suggestions, I concur in the opinion.

Woodson, J., concurs in these views.

THE STATE ex inf. J. M. CARNAHAN, Prosecuting
Attorney, ex rel. FRANK P. WEBB et al. v. M.
W. JONES et al., Appellants.

In Banc, December 8, 1915.

1. **CONSOLIDATED SCHOOL DISTRICT: Signers of Petition:** Residence. The petition to the county superintendent for the establishment of a consolidated school district under the Act of March 14, 1913, Laws 1913, p. 721, is not required to be signed by qualified voters of every existing district to be affected. The statute requires the petition to be signed by twenty-five qualified voters of the community, and a "community" may include several districts or parts of districts, and as used in the statute means resident citizens of a locality in more or less proximity.
2. ———: **Inclusion of Parts of Districts Not Named in Petition.** The statute does not require that the petition for the establishment of a consolidated school district shall fix absolutely its boundaries. The county superintendent is given authority to include within its boundaries parts of existing districts not named in the petition.
3. ———: ———: **Infringement of Constitutional Right.** There is no infringement upon the constitutional right of an existing school district by taking from it a part of its territory and including it within the boundaries of the consolidated district proposed to be formed, without giving to the voters of the part not taken the right to vote on the question of organization of the consolidated district. The Legislature is given the power to provide methods of forming new districts, changing the boundary lines of old ones and dividing existing districts.
4. ———: **Voters.** The voters within the consolidated school district as bounded by the county superintendent are entitled to vote on the question of the organization thereof, and the statute gives no persons outside that territory the right to object because he was not consulted.
5. ———: **Certification: Addressed to County Clerk.** The statute does not require the certificate showing the proceedings of the meeting by which the organization of the consolidated school district was affected, to be addressed to the county clerk. It simply requires the proceedings of the meeting to be certified to him.
6. ———: ———: **The Word "Certify."** The word certify is not indispensable to a certificate. It means to give certain knowledge or information, or to testify with certainty in writing.

7. ———: ———: **Sufficiency.** A written statement setting forth the place and time of the special meeting called by the county superintendent to pass on the question of the organization of a consolidated school district, that the qualified voters met as per the call, that they were called to order by said superintendent, that a certain voter was elected chairman and another secretary, that the chairman ordered a ballot taken on the proposition, that it resulted in so many votes for consolidation and so many against, and that six directors were elected, etc., and signed by the chairman and secretary and sworn to by them, contains the facts required to be certified by the statute, and is not insufficient as a matter of law.
8. ———: **Construction of Statute.** No strict or technical construction is to be put upon the statute authorizing the organization of consolidated school districts. It was designed as a workable method by plain, honest, worthy citizens not specially learned in the law.
9. ———: **Policy of Statute.** As long as the Legislature violates no constitutional restriction upon its acts, the wisdom of any act is not subject to review by the courts; nor can the courts consider the policy of an act authorizing the consolidation of school districts when applied to sparsely settled communities, or when applied to a single district already organized which contains a large part of the voting population in the community or territory affected by the proposed consolidation.

Appeal from Carter Circuit Court.—*Hon. W. N. Evans*, Judge.

REVERSED AND REMANDED (*with directions*).

J. B. Daniel for appellants.

(1) It is not necessary under the Laws of 1913, p. 722, sec. 3, that the petition of qualified voters to the county superintendent should be signed by a petitioner or petitioners from each of the school districts affected by the organization of a consolidated schools district organized in response to such petition. *State ex rel. v. Job*, 205 Mo. 28; Instructions of State Superintendent of Schools under Sec. 10837, School Laws 1913, p. 52; Instructions of State Superintendent of Schools, School Laws, p. 93. (2) The School Laws,

being intended to be executed by plain people not learned in the law, will be liberally construed to effect the purpose for which they were enacted. State ex rel. v. Gordon, 261 Mo. 649; State ex rel. v. Job, 205 Mo. 34. (3) The petition to the county superintendent is solely for his information, and having served that purpose relators should not be heard to complain of defects therein if any there be. Laws 1913, p. 722, sec. 3; State ex rel. v. Young, 84 Mo. 94. (4) The county superintendent of schools was not and could not be restricted by the petition in the matter of the territory to be included in a proposed consolidated school district. It was his duty, not the duty of the petitioners, to determine what territory should be included. Laws 1913, p. 722, sec. 3. (5) There was filed with the clerk of the county court by the chairman and secretary of the special school meeting a sufficient certificate of the proceedings of said meeting. Webster's International Dictionary, defining "Certify" and "Certificate"; Standard Dictionary; Bouvier's Law Dictionary; Land Co. v. Morten, 183 Mo. App. 637; Bank v. Stackpole, 41 Me. 302; People v. Foster, 58 N. Y. 574; State v. Brill, 58 Minn. 152; Kipp v. Dawson, 59 Minn. 82; State v. Schwin, 65 Wis. 207; State v. Gee, 28 Ore. 100; Railroad v. People, 200 Ill. 237; McDonald v. State, 8 Mo. 283; Ziff v. Colored Masonic Lodge, 80 Ark. 31; Anderson's Law Dictionary; Witcher v. Conklin, 84 Cal. 499.

Stuart L. Clark and *John H. Raney* for respondents.

(1) The "community" described in the petition for the organization of Consolidated School District No. 2, was composed of four smaller communities already organized for educational purposes and which were bodies corporate, were named in the petition, and were to compose the larger proposed "communi-

ty," and the boundaries thus described marked the limits of "this community" which the petition requested the county superintendent to visit, and out of which it was sought to organize the consolidated school district. A school district is a "community" organized for educational purposes; it is composed of a society of people living in the same place (school district), under the same local laws and regulations prescribed for educational purposes, and who have, as to those laws and regulations, the same rights and privileges. Black's Law Dict., Title, Community. It is also a body politic and corporate. R. S. 1909, sec. 10837. It is, therefore, a "community" under the rule of both the common and the civil law. 8 Cyc. 397.

(2) The limits of the boundaries of the community which was sought to be organized into a consolidated district were fixed by the boundaries of the districts named in the petition for consolidation. Laws 1913, p. 722, sec. 3; *People ex rel. v. Darrough*, 107 N. E. 844; *Pieper v. County Superintendent*, 153 N. W. 112; *Smith v. State ex rel.*, 149 Pac. 884. There is no warrant in the law for adding to the districts named in the petition, the adjoining districts. Laws 1913, p. 722. And, the action of the county superintendent in adding territory not named in the petition, was without authority of law, and rendered the whole proceeding void. *People ex rel. v. Darrough*, 107 N. E. 844. (3) To permit the inclusion of a school district within the boundaries of a proposed consolidated school district where no qualified voters living in such district have signed the petition for such consolidation, would destroy the corporate existence of such district without the consent of a single inhabitant thereof, and would deprive them of the right of local self-government in the administration of their educational affairs, contrary to the provisions of section 3 of article 1 of the Constitution. (4) The charter of a consolidated school district consists in the certifi-

cate of the chairman and secretary of the special school meeting, of the proceedings of said meeting to both the county clerk and the county superintendent of the county in which such district is organized. This record is barren of any proof that any certificate was ever filed with the county superintendent of schools of Carter county. And the purported certificate filed with the county clerk is not a certificate certifying to anyone the proceedings of the meeting; it is addressed to no one and certified by no one. The absence of any charter conclusively shows that the purported district has no corporate existence. State ex inf. v. Cummins, 114 Mo. App. 93; School District v. Hodgin, 180 Mo. 79.

BLAIR, J.—This is an appeal from a judgment of the circuit court of Carter county in favor of informant in a proceeding in *quo warranto*, instituted by the prosecuting attorney, to oust appellants from office as directors of Consolidated School District No. 2 in that county.

By the pleadings and admissions in open court the only questions for solution by the trial court were: (1) whether, when it is proposed to establish a consolidated school district under the Act of March 14, 1913, the petition to the county superintendent must be signed by qualified voters of every district to be affected; (2) whether parts of existing districts not mentioned in the petition, though included in the notice, can be included in the consolidated district; and (3) whether the certificate or report made under section 3 of the act was, in this case, sufficient as a matter of law.

The act in question, Laws 1913, pp. 721 et seq., is set out in full in State ex rel. v. Gordon, 261 Mo. 631.

I. Respecting the qualifications of the signers of the petition whereby proceedings for the organization of consolidated districts are initiated, the sole provision of the Act of March 14, 1913 (Laws 1913, p. 722, sec. 3), is as follows:

Signers of
Petition.

“When the resident citizens of any community desire to form a consolidated district, a petition signed by at least twenty-five qualified voters of said community shall be filed with the county superintendent of public schools.”

In the instant case, the petition was signed by the requisite number of qualified voters of the community, but none of them resided in District No. 22, which it was proposed in the petition to include in the consolidated district. The trial court held this was fatal to the proceedings, invalidating the organization.

With this conclusion we are unable to agree. The act does not require that every district proposed to be affected shall be represented among the signers of the petition. In fact, it does not require that every district which shall be affected shall be mentioned in the petition. The act does not deal with the matter at all upon the basis of districts already organized. It requires merely that the signers of the petition shall be qualified voters of the “community,” the resident citizens of which desire to form a consolidated district. The word community in this act is not employed in any technical or strictly legal sense, but is a sort of synonym of “neighborhood” or “vicinity” (Berkson v. Railroad, 144 Mo. l. c. 220, 221) or may be said to mean the people who reside in a locality in more or less proximity. [Keech v. Joplin, 157 Cal. l. c. 11.] So defined, a community may include several districts and parts of districts. There is no requirement that the petitioners shall reside here or there in the community. That they are resident citizens of it is enough.

II. The trial court held that the organization was void because the county superintendent included within the boundaries of the proposed district parts of districts not named in the petition, though adjacent to those specified therein.

Districts Not
Named in
Petition.

The applicable provision of the statute (Laws 1913, p. 722, sec. 3) is: "On receipt of said petition, it shall be the duty of the county superintendent to visit said community and investigate the needs of the community and determine the exact boundaries of the proposed consolidated district. In determining these boundaries, he shall so locate the boundary lines as will in his judgment form the best possible consolidated district, having due regard also to the welfare of adjoining districts."

From this provision it clearly appears that it is not intended that the petition shall fix absolutely the boundaries of the proposed district. In fact, it appears that the chief function of the petition is to call the attention of the county superintendent to a community twenty-five of whose resident citizens desire to organize a consolidated district. It is the duty of the superintendent to determine (subject to limitations not affecting the question being considered) the exact boundaries of the district, the organization of which is to be submitted to the voters therein. Besides the absence of positive restrictions founded upon boundary lines of existing districts, the very fact that the superintendent is admonished to have "due regard also to the welfare of the adjoining districts" is a clear intimation that such districts are not excluded from, at least, partial inclusion in the district as he shall lay it out. Provision is also made (Sec. 5, Laws 1913, p. 723) for the annexation to other districts of remaining portions of districts, parts of which have been included in the new district.

There is no infringement of any constitutional right of a district, part of which is taken. This is true despite the fact that the voters resident in that part not included in the new district do not vote upon the question of organization. The Legislature is empowered to provide the methods of forming new districts and changing boundary lines of old ones (*State ex rel. v. Andrae*, 216 Mo. l. c. 630) and of dividing existing districts (*R. S. 1909*, sec. 10842), and there is perceived no constitutional objection to the method of consolidation provided by the Act of 1913, interpreted as above stated. Cities can constitutionally be authorized to extend their limits without a submission of the question of extension to others than citizens of the city involved (*Hislop v. Joplin*, 250 Mo. 588, and cases cited); and no constitutional provision is pointed out which forbids the taking of parts of several school districts into a consolidated district upon the affirmative vote of the qualified voters residing in the whole territory proposed to be organized into a consolidated district, including the parts of districts so proposed to be incorporated.

Notice according to the statutory requirements was given in this case and its sufficiency is not questioned. The voters within the territory delimited by the county superintendent in this case, after legal notice, voted to organize the district. The statute gave them that right and gives no one outside that territory the right to object because he was not consulted. It was error to hold otherwise.

People v. Darrough, 266 Ill. 506, is not in point. Under the statute involved in that case, the petition fixed the boundaries of the proposed district. Under our statute this is not the case. Neither is the decision in *Smith v. State ex rel. Cole*, 149 Pac. (Okla.) 884, applicable. In that case, the statute involved required that the petition be signed by one-half of the qualified voters in each of the districts proposed to

be affected. That statute is wholly unlike ours. The statute discussed in *People v. Keigwin*, 256 Ill. 264, required the consent of two-thirds of the voters of each district affected before consolidation could be had. No similar requirement is found in our statute. The trial court erred in its ruling upon this phase of the case.

III. The trial court held that the certificate required by section 3 of the Act of March 14, 1913, to be made out and filed with the county clerk and county superintendent was insufficient as a matter of law.

The act requires (Laws 1913, pp. 722, 723, sec. 3) that the meeting to determine whether the consolidated district shall be organized shall be called to order by the county superintendent or some one deputized by him for that purpose; that "the meeting shall then elect a chairman and a secretary and proceed in accordance with section 10865, Revised Statutes 1909. The proceedings of this meeting shall be certified by the chairman and secretary to the county clerk . . . and also to the county superintendent . . . of schools."

In this case, the chairman and secretary of the meeting made out, signed and swore to the following:

Hunter, Mo., Jan. 30, 1915.

Pursuant to call of special meeting called by Co. Supt. (W. S. Perrin), to be held in Hunter, Mo., at school house on Sat. at 2 o'clock p. m., Jan. 30, 1915, to organize a consolidated school district in this community, with boundaries as laid out in plats posted. The qualified voters met as per call. The house was called to order by Co. School Supt. who fully stated the object of the meeting. Meeting was organized by electing G. E. Grafues, Chairman, and J. M. Zion, Sec. The chair ordered ballots taken on proposition above named which resulted as follows: For consolidation thirty-five (35) and against consolidation twenty-seven (27). Moved and seconded that six directors be elected for terms as follows, two for three years, two for two years and two for one year. The result was as follows: M. W. Jones and W. S. Connelly for three years;

R. E. Bray and M. Johnson for two years; G. E. Grafues and B. A. Lawhon for one year. No further business the meeting adjourned.

J. M. ZION, Sect.

G. E. Grafues, Chairman.

Subscribed and sworn to before me. This the 1st day of Feb., 1915. My term as notary public will expire Sept. the 11th, 1918.

JOE MOON,

(Seal)

Notary Public.

For some reason the notary was called as a witness and testified that G. E. Grafues and J. M. Zion signed in his presence and were sworn to the above by him. The certificate was delivered to the county clerk.

Some difficulty is encountered in grasping the objection to the document set out. The court, in its judgment, simply says it is "not a sufficient compliance with the statute." Counsel suggest that it is not addressed to the county clerk "nor was it certified by the chairman and secretary, but was sworn to before a notary public, and that certificate or jurat of the notary does not show by that affidavit that either the chairman or secretary made oath that the facts stated therein were true."

It is not argued that the facts stated in the certificate are insufficient under the Act of 1913 and section 10865, Revised Statutes 1909, to show proceedings effectual to consolidate the territory affected. The statute does not require the certificate to be addressed to the county clerk or any one else. It requires that "the proceedings of this meeting shall be certified . . . to the county clerk," etc. The word "certify" is not indispensable in a certificate [Spratt v. State, 8 Mo. 247.] "To certify" is thus defined in 6 Cyc. 729: "To give certain knowledge or information of; make evident; vouch for the truth of; attest; to make a statement as to matter of fact; to testify in writing; give a certificate of; make a declaration about in writing, under hand, or hand and seal; . . . to make a

declaration in writing; . . . to testify to a thing in writing.”

The dictionaries and decided cases bear out these definitions. No strict and technical construction is to be put upon the statute involved, nor is a strict and technical compliance with it to be exacted of the “plain, honest, worthy citizens, not specially learned in the law” in the performance of their duties under it. [State ex rel. v. Job, 205 Mo. l. c. 34.]

The certificate was given under the hand of persons designated for that purpose by the statute and, in addition, was sworn to by them. The facts certified are sufficient. It is objected that it was not proved that a copy was sent to the county superintendent. No such proof was necessary, since the pleadings admitted that fact, and the agreement on the trial expressly excluded any need of proof of it.

The cases cited by respondent upon this proposition do not militate against our conclusion upon this phase of the case, which is, that the trial court erred in holding the certificate insufficient.

IV. Respondent comments upon the policy of the Act of March 14, 1913, as applied to sparsely settled communities and to those in which a single Policy of Law. district, already organized, contains a proportionately large number of the voting population in the community or territory affected by a proposed consolidation. With this we have nothing to do. As long as the Legislature violates no constitutional limitation upon its powers, the wisdom of its action is not subject to review. That feature of legislation is remediable at the polls, not in the courts.

The judgment in this case is reversed and the cause remanded with directions to quash the writ and dismiss the information. All concur.

FIDELITY TRUST COMPANY OF KANSAS CITY
et al. v. CHARLES G. REVELLE, Superintendent
of Insurance.

In Banc, December 8, 1915.

1. **TRUST COMPANY SECURITIES: Depositary: State Bank Commissioner.** By the Act of March 25, 1915, repealing articles 1, 2 and 3 of chapter 12, R. S. 1909, and all intervening acts, and enacting three new articles in lieu thereof, the duties theretofore imposed upon the Superintendent of Insurance, as custodian of the securities required of trust companies as a guaranty of the proper performance of the business they are permitted by law to carry on, are transferred to the Bank Commissioner, and the securities required should now be deposited with said officer, and if heretofore deposited with the Superintendent of Insurance they should be transferred to the Bank Commissioner, upon condition of liability for any intervening obligation.
2. ———: ———: ———: **Transfer Upon Condition.** But such transfer should be made only upon the filing of a statement by the trust companies, both with the Superintendent of Insurance and the Bank Commissioner, that the deposit heretofore made with the Superintendent of Insurance shall be subject to any charges or liens which have arisen out of the obligations or business transacted by the trust companies since such deposit was made.

Mandamus.

WRIT GRANTED (*conditionally*).

Robinson & Goodrich for relators.

John T. Barker, Attorney-General, and *Lee B. Ewing*, Assistant Attorney-General, for respondent.

OPINION.

BOND, J.—This is an application by two trust companies of Kansas City for a mandamus requiring the respondent, State Superintendent of Insurance, to

transfer to J. T. Mitchell, State Bank Commissioner, two hundred thousand dollars of securities heretofore deposited with said Superintendent by each of the relators. The respondent waived the issuance of an alternative writ, entered his appearance and answered, admitting the allegations of the petition for the writ, but denied that the facts stated warranted the relief prayed for.

I. Upon the allegations of the petition and applicatory statutes, we think the writ should be made permanent for the following reasons:

On the 25th of March, 1915, the General Assembly repealed articles 1, 2 and 3 of chapter 12 of the Revised Statutes of 1909, and all intervening amendments thereof, and enacted as substitutes for such repealed laws, three new articles to be designated as articles 1, 2 and 3 of chapter 12, all of which are set out and contained in the Laws of 1915, pp. 102 to 195 inclusive. This act was passed with an emergency clause. Under the former law (R. S. 1909, sec. 1140) any trust company which had deposited two hundred thousand dollars of securities with the Insurance Superintendent and after receiving his certificate to the effect and that it was solvent, might engage in the business specified in said section, and among other things "insure the fidelity of persons holding places of public or private trust." By the terms of the analogous section of the new law (Laws 1915, p. 188, sec. 166) such companies are required to make the same deposit of two hundred thousand dollars with the Bank Commissioner and upon receiving a similar certificate from him, are authorized to engage in the business prescribed in the old act, except that they are not permitted to insure the fidelity of persons holding places of public or private trust. That power is withdrawn by the present act. While the substitute act contains no express provisions for the transfer to the Bank Commissioner of the

Depository
of Trust
Company
Securities.

securities thereof deposited with the Insurance Superintendent, yet the whole scope and purpose of the act, as well as the repeal of the old law, which made the Insurance Superintendent the custodian of these securities, make it plain that the Bank Commissioner succeeds the Insurance Superintendent as the depository of that fund, at least to the extent that it is not charged with any obligations of the depositor which were incurred while it was in the possession of the Superintendent of Insurance.

Under the present act, the Bank Commissioner is charged with the same duties of custody and preservation of the funds which were imposed on the Superintendent of Insurance, and it is chargeable in his hands with the same obligations of the trust company with which it was chargeable in the hands of his predecessor. The Bank Commissioner is also required to make the same certificate of the fact of such deposit and of the solvency of the trust company, before it can do the business specified in the present act. It is perfectly clear that the Superintendent of Insurance can no longer perform these duties. And it necessarily follows that the securities which were intended to guarantee the business of the depositor in this State, should be placed now in the hands of the person now charged with the duty of preserving them for that purpose, and of issuing a certificate to the depositor so as to entitle it to engage in business in this State.

We see no escape from the conclusion that a proper construction of the present act is that it meant to do away, after its passage, with any further duties in respect to the custody of securities on the part of the Superintendent of Insurance, and to charge those duties upon the State Bank Commissioner, since they can only be adequately performed by a custody of the securities required by law to be deposited by trust companies before engaging in the business they are permitted to carry on, and the new act expressly requires

a deposit of two hundred thousand dollars to be made with the Bank Commissioner by any trust company now or hereafter organized in this State. [Laws 1915, p. 188, sec. 166.] Evidently, these securities should be in the possession of the trustee constituted by the present act and empowered by it to certify that they have been deposited with him by a solvent trust company.

II. This application is made on behalf of two trust companies who are seeking to put the securities required to be deposited by them in the hands of the officer or trustee who has succeeded the Superintendent of Insurance.

Transfer
Upon
Condition.

Clearly this transfer ought not to be ordered except upon the filing of a statement, both with the Superintendent of Insurance and the Bank Commissioner, that the funds in question shall be primarily subject to any charges or liens which have arisen out of the obligation or business transacted by the relators heretofore. Upon the filing of such statements in writing, the Superintendent of Insurance is hereby directed to transfer the amounts heretofore deposited with him by the relators to the Bank Commissioner, by whom they shall be held to answer any and all obligations for which they are liable or chargeable while in the hands of the Superintendent of Insurance, and which shall accrue against them while in the possession of the Bank Commissioner under the terms of the Act of March 25, 1915.

Let the writ prayed for be made permanent upon the conditions above stated. All concur; *Revelle, J.*, not sitting.

E. W. STEPHENS et al., Constituting State Capital Commission Board, v. JOHN P. GORDON, State Auditor.

In Banc, December 8, 1915.

1. **NEW STATE CAPITOL: Furniture.** The Act of March 24, 1911, Laws 1911, p. 108, providing for the building of a new state capitol, invested the State Capitol Commission Board with no authority to purchase furniture for the new building. The board is by it created "for the purpose of building a new state capitol," and it specifically says that the terms of its members "shall end with the construction of the building;" and while it makes an appropriation of the money for the construction of building and the purchase of additional grounds, it makes none for buying furniture.
2. ———: ———: **Purchaseable Out of Other Funds.** The said act limits the State Capitol Commission Board's power to expend money to a sum of \$500,000 less than the bond issue authorized by the people; and the cognate acts disclose that this \$500,000 is the sum set aside by the act submitted to the people as the maximum amount, out of the proceeds of the bonds, which is to be available for other purposes than the construction of the capitol, including furniture, and this entire sum, out of which the provision for furniture is made, the board is directly excluded from using.
3. **AMBIGUITY IN STATUTE: Resort to its Title.** Where the terms of an act are ambiguous, resort may be made to its title for whatever light it can give; but resort to the title is not justified if the body of the act is free from ambiguity. And the Act of March 24, 1911, being entirely clear and on its face showing that it does not authorize the State Capitol Commission Board to purchase furniture for the new capitol, it is of no consequence that its title covers the furniture as well as its construction.
4. **NEW STATE CAPITOL: Building and Furniture: Single Board.** The act adopted by the people, authorizing the issuance and sale of bonds for building a new state capitol, did not provide that a single board should have charge of the construction of the capitol and the purchase of furniture, nor did it prohibit the creation of separate boards, nor provide for any board at all; but it left the Legislature untrammelled in that respect, and the cognate legislative act invests the only board it created with no power to buy furniture for the new building.

Stephens v. Gordon.

5. ———: Construing Statute: Convenience. Likelihood of delay in case furniture for the new capitol cannot be purchased before the meeting of the next Legislature unless it is held that the present State Capitol Commission Board is invested with power to purchase furniture, is an argument from convenience, which has a place in construing ambiguous statutes, but none in construing a clear and unambiguous one. Courts have no power to reconstruct statutes merely for the purpose of making them conform to their ideas of wisdom.

Mandamus.

WRIT DENIED.

A. T. Dumm for relators.

(1) If there is any doubt as to the meaning of the statutes or ambiguities in their provisions, the court will construe the various provisions so as to avoid public inconvenience. (2) The court should look at the history of the times and all the surrounding circumstances in order to ascertain the scope and the purpose of the act creating the State Capitol Commission Board. (3) Reference to the title of an act is proper in cases of doubt, in order to ascertain the meaning of the act and to give it a reasonable interpretation. (4) There can hardly be a doubt that the various acts are *in pari materia*. The law found in Laws 1911, on page 416, is incorporated by reference and made a part of the acts of the same Laws on pages 108 and 250.

John T. Barker, Attorney-General, *Thomas J. Higgs*, Assistant Attorney-General, and *Lewis Hord Cook* for respondent.

(1) The act creating the "State Capitol Commission Board" does not authorize the purchase of office furniture or office equipment by said board. (2) The act is not ambiguous and therefore the title to said act should not be considered in construing the same.

If the title of the act is considered in the construction of said act then there is no authority given the "State Capitol Commission Board" by said act to purchase furniture for the offices in the capitol building. (3) The doctrines of public convenience and *in pari materia* are not used in the construction of an act when said act is not ambiguous. The act in this case is not ambiguous and these rules of construction are not applicable to this cause.

BLAIR, J.—This is a proceeding by mandamus, instituted by the members of the "State Capitol Commission Board" for the purpose of compelling the State Auditor to audit an account for office furniture for the new capitol and issue his warrant for \$32.50 in payment thereof. This is the only purchase of the kind, so far as the petition shows. Respondent entered his appearance, waived the issuance of the alternative writ and demurred, generally, to the petition therefor. Relators thereupon moved for judgment.

Under the issues made, the sole question presented is whether the State Capitol Commission Board is empowered to purchase the furniture for the new capitol.

The title of the Act is as follows:

"An Act providing for building a new state capitol at the present seat of government of the State of Missouri and for acquiring other premises than those now owned by the State, for additional State capitol premises and making provision, and also appropriations out of the state treasury, for carrying out the purposes and provisions of this act, and also of an act of the General Assembly of this State entitled, 'An Act authorizing and directing the contracting of the liability of the State of Missouri by the issuance of its state bonds in a sum, not to exceed three and one-half millions of dollars, and for the sale of said bonds, to

provide means for the building, furnishing and other equipment of a new state capitol at the present seat of government of the State, and for the purchase of additional state capitol premises, and also providing for the payment of said bonds and interest accruing thereon,' Approved March 16, 1911." [Laws 1911, p. 108.]

Section 1 of the act first provides "that for the purpose of building a new state capitol at the present seat of government of this State, there is hereby created a board of commissioners to be styled the 'State Capitol Commission Board.'" The section then proceeds to fix the number and qualifications of the members of the board and provide the manner of their election, and continues: "Said commissioners . . . shall hold their offices until the completion of said building unless sooner removed for cause;" provides for bonds to be given by the members, for the filling of vacancies, for the general manner of conducting the business of the board, for its offices and times of meeting and for the compensation of members, and concludes: "The term of the members of the board shall end with the construction of the building proper."

Section 2 provides that "it shall be unlawful for any member of the board to be connected directly or indirectly in any manner with any contract or part thereof for the building of said state capitol or for any work or employment connected therewith or for the purchase or furnishing of any material or supplies therefor, or to accept any benefit therefrom, or the promise of any such benefit" in any manner, and then fixes drastic penalties for the violation of that provision and forbids the employment of any person as superintendent "of the construction of said building who is or shall become connected directly or indirectly with any contract for the building of said capi-

tol or for the furnishing of any of the material or labor therefor." In this section is set out the oath to be taken by members of the board, as follows:

"I, _____, do solemnly swear that I am not now and shall not, directly or indirectly, become interested or concerned in any manner with any contractor or contractors, person or persons, company or corporation for the construction of the state capitol or any part or portion thereof or in the proceeds or profits arising out of the same or in any work or labor done thereon or material furnished in the construction of said building, and that I shall faithfully and impartially, according to law, perform all my duties as a member of the State Capitol Commission Board."

Section 3 provides for the purchase or condemnation of certain premises in Jefferson City, adjacent to the old capitol grounds.

Section 4 provides for the selection of "plan for a state capitol; . . . said plan to be obtained by a competitive architectural contest," and defines in part the method to be pursued in that connection. It proceeds thus: "No plan shall be adopted unless accompanied by a detailed and accurate specification of the approximate cost of material and other expenses necessary for the construction of said building, including heating and ventilating apparatus, lighting, vaults and all proper fixtures and conveniences, nor until it shall be definitely ascertained that the aforesaid cost shall not in the aggregate exceed three millions of dollars (and the interest received by the State on proceeds of sale of the bonds hereinafter referred to). Said state capitol shall be so constructed and arranged as to afford suitable and adequate offices, compartments and conveniences for the departments of the state government at the seat of government. It shall be a modern, fire-proof structure and be constructed of granite, or stone or both and other material suitable and proper to be used in said construction; shall have, above the base-

ment, a first floor for state office departments, also a second floor for legislative chambers and offices, and a third floor for offices and committee rooms; shall have a roof of either tiling, slate, sheet metal or other suitable material, and shall be provided with proper heating, lighting and ventilation facilities and with the most modern and approved sanitary arrangements and equipment."

The section then authorizes the board to confer with persons "conversant with the subject" and to visit other state capitols in order to procure information upon which to base its selection of a plan.

Section 5 authorizes the board, after adopting a plan, to enter into "a contract or contracts in writing for the construction of said capitol pursuant thereto." It authorizes the board to "contract for the construction of the entire building by a contractor, individual or corporate, who may undertake the whole work" or to make separate contracts for different classes of work, if the board deems it advisable to divide the work into classes. It requires all contracts for the construction of said building or for designated classes of the work thereof to be let to the lowest and best bidder, and provides the manner of letting bids, and requires that "all contracts for the construction of said building or classes of work thereof or for material and labor shall be in writing" and signed in a prescribed manner. It then proceeds: "No contract or contracts shall be made or entered into by the board incurring in the aggregate an expense greater than three millions of dollars and the interest received by the State on the proceeds of the sale of bonds hereinafter referred to for the construction of said building."

Provision is then made for the cancellation of contracts in proper cases, for the retention of a per cent from payments due on monthly estimates, and for the quality of materials used, for preference of Missouri

materials and labor, the use of Missouri granite and stone, and that the plans and specifications shall be executed by skillful and reputable architects, contractors, artists, mechanics and laborers. Bonds are required of contractors, and the preservation and filing of vouchers, contracts, files and papers is enjoined upon the board "until after the completion of said building, and shall then be delivered to the State Auditor for preservation by him in his office. The board is authorized to make all contracts and agreements and employ all the aid and assistance and adopt all means appropriate for carrying out the purposes of this act."

Section 6 prescribes the manner of appointment, qualifications, term of office, oath, bond and duties of the secretary of the board. Only one sentence of the section has any bearing upon the question in this case. It is as follows: "He shall keep a set of books showing in systematic form all the expenditures incurred by the board in and about the building and construction of said state capitol; also showing at all times the condition of the funds appropriated for and applicable for said purpose."

Section 7 provides for the appointment and prescribes the qualifications and duties of a superintendent of construction.

Section 8 provides that the Board of the Permanent Seat of Government shall decide tie votes in the State Capitol Commission Board and makes the Attorney-General its legal adviser.

Section 9 prescribes the manner in which accounts are to be audited and paid. There is nothing in the section throwing light upon the question in this case.

Section 10 reads as follows:

"Appropriation.—That if the act of the Forty-sixth General Assembly, to be submitted to the voters of this State, referred to in the next succeeding section of this act, shall be ratified by two-thirds of the legally

qualified voters of this State, voting at an election held for that purpose, and it thereby becomes a valid and binding law, and the bonds authorized by said act are issued and sold pursuant thereto, the entire proceeds of the sale thereof shall be paid into the state capitol building fund, then said proceeds (which it is estimated will aggregate the sum of three and one-half millions of dollars, more or less) shall be and the same with all interest accruing therefrom, are hereby appropriated to the construction of the state capitol referred to in this act, to the purchase of additional State capitol premises as contemplated by this act, and to otherwise carrying out its purposes and provisions, and also the purposes and provisions of the act of the 46th General Assembly of this State to be ratified by the voters of the State and referred to in the next succeeding section of this act: *Provided*, however, that so much of the proceeds of the sale of said bonds as may be necessary for the purpose, may be used for the payment of the coupons of said bonds, maturing during the years 1911 and 1912; the same to be restored to said capitol building fund out of the moneys collected to pay said bonds and interest thereon, when so collected, and paid into the State treasury."

Section 11 reads as follows:

"Act, when effective.—That this act shall take effect and be in force from and after the ratification, by the voters of this State and the proclamation of the governor to that effect, of an act of the 46th General Assembly of this State entitled 'An act authorizing and directing the contracting of the liability of the State of Missouri by the issuance of its state bonds in a sum, not to exceed three and one-half millions of dollars, and for the sale of said bonds, to provide means for the building, furnishing and other equipment of a new state capitol at the present seat of government of the State, and for the purchase of additional state capitol premises, and also providing for the payment

of said bonds and interest accruing thereon,' approved March 16, 1911."

The act of March 16, 1911 (Laws 1911, p. 416), referred to in sections 10 and 11 of the act above summarized, was the act which provided for the contracting of the liability and the issuance of bonds of the State of Missouri in an aggregate of not more than \$3,500,000, the proceeds whereof "shall constitute a fund to be designated as a capitol building fund, and shall be applied exclusively to the building of a new state capitol at the present seat of government of the State, including the furnishing and other equipment of said building and the purchase by the State of additional capitol premises adjoining those now owned by the State; *provided*, that three hundred thousand dollars of said fund, or so much thereof as may be necessary, shall be applied to the furnishing and other equipment of said capitol, and two hundred thousand dollars of said fund, or so much thereof as may be necessary, shall be applied to the purchase of land (adjoining the present state capitol premises) for additional state capitol premises. . . . Contract or contracts for expenditure to carry out the purposes of this act in excess of said three and one-half millions of dollars, with interest collected thereon, shall, to the amount of such excess, be illegal and void and forever non-payable."

Section 2 of this act provides for the levy of an annual tax, and section 3 provides for the taking effect of the act after its ratification by a constitutional majority of the voters of the State.

By an act approved March 24, 1911 (Laws 1911, p. 250), the act next above summarized was submitted to the voters of the State, the manner of holding the election being prescribed in detail. The election resulted in the ratification of the act.

The provision of the act constituting the State Capitol Commission Board and other acts relating to

the new capitol are set out sufficiently to exhibit the foundations of the argument of counsel in the case. Of these acts no part which bears any relation to the question presented is omitted.

Upon the face of the statute it is beyond question that the State Capitol Commission Board has no authority to purchase furniture for the new capitol.

The act providing for the creation of the board and defining its powers makes no provision of any kind for the purchase of furniture. In its opening sentence it declares generally that the board is created "for the purpose of building a new state capitol." It specifies the contracts the board can make and none of these pertains to anything resembling the purchase of furniture. Pains are taken to provide for the severe punishment of any member of the board who is or shall become directly interested in certain specified contracts, all of which relate solely to the construction of the new capitol building. The oath prescribed deals solely with interest in like contracts. No such provisions relating to contracts for furniture are found in the act. The board is forbidden to adopt a plan of construction until it "shall be definitely ascertained that the . . . cost" thereunder shall not in the aggregate exceed three million dollars and certain interest thereon; thus fixing definitely the sum the board may expend for the building, including heating and ventilating apparatus, lighting, vaults and all proper fixtures and conveniences, as well as the "most modern and approved sanitary arrangements and equipment." It further provides that no contract or contracts shall be made or entered into by the board incurring in the aggregate an expense greater than three million dollars. These provisions fix the amount which the board may expend in the construction of the new capitol at three million dollars and the interest mentioned, and then forbid the board to enter into contracts of any

kind for a greater aggregate amount than that fixed as the maximum cost of the building.

In addition, under the act, the term of office of the members of the board can continue only "until the completion" of the new capitol building, and this is confirmed by a later provision that "the term of the members of the board *shall end with the construction of the building proper.*" The board is charged to file and preserve its vouchers, contracts, etc., "until after the completion" of the *building*, when these are to be delivered to the Auditor. The records to be kept by the secretary pertain solely to the construction of the building.

The act is entirely clear and free from ambiguity and simply provides a board to which is committed specified duties, all relating solely to the construction of a capitol building and having nothing whatever to do with the purchase of furniture. It clearly and positively limits the board's power to expend the State's money to a sum of \$500,000 less than the bond issue authorized by the people; and cognate acts above referred to disclose that this \$500,000 is the sum set aside by the act submitted to the people as the maximum amount, out of the proceeds of the bonds, which is to be available for other purposes than the construction of the building, including furniture. This entire sum, out of which the provision for furniture is made, the board is directly excluded from using.

It is argued that the title of the act creating the board includes within it the title of the Act of March 16, 1911, and that this quoted title covers the furnishing as well as the construction of the new capitol. It may be conceded that in case the terms of an act are ambiguous, the title may be looked to for whatever light it can give. There is no ambiguity in the act of March 24, 1911, as already pointed out, and resort to the title is therefore not justified by the rule. Besides, the reference in the title to the title of the act of March

16, 1911, in no way can amplify the plain terms of the body of the act creating the board and confer upon the board powers the unambiguous language of the act denies them. The title of the act is broad enough to include all the law the Legislature actually wrote under it and is in harmony therewith. If it be assumed that it is broad enough so that more constitutionally might have been written into the act, this could not possibly justify us in writing into the act what the Legislature lawfully might have put in but actually left out. Further, the title reference to the title of the prior act explains itself and warrants no such construction as counsel seeks to put upon it.

It is argued that the people voted for a complete building, including furniture and not for an unfurnished building, "the use of which would be left to the uncertainty of future legislatures."

The Act of March 24, 1911, creating the State Capitol Commission Board, was passed long prior to the capitol bond election, and one result of that election was to give effect to that act. The particular act adopted at the election of 1911 made no provision for any board. That was necessarily left to the Legislature. Neither did the act adopted provide that a single board should have charge of the construction of the capitol and the purchase of furniture. The people did not, by their vote, prohibit the creation of separate boards, but left the Legislature untrammelled in that respect. The intent of the people was to do exactly what they did—leave the Legislature unrestricted with respect to the question whether the same board should both construct the capitol and purchase the furniture therefor.

Something is said concerning extrinsic facts supposed to bear upon the question of the advisability of permitting the board to purchase the furniture for the new building. No such facts are pleaded except the likelihood of delay in case the furniture cannot be pur-

chased before the meeting of the next Legislature. This is the argument from convenience. It has place in construing ambiguous statutes, but has none here. If the failure to provide that the board shall purchase the furniture for the new capitol is unwise, the responsibility lies with the Legislature. We have no power to reconstruct statutes merely to conform them to our idea of the wiser course in the premises. The peremptory writ is denied. All concur; *Bond, J.*, in separate opinion.

CONCURRING OPINION.

BOND, J.—The act being unambiguous is self-interpretative, and constituted, in my judgment, no ground for this proceeding, of which, from the record, I am unable to take any other view than that it is a “moot” case of which this court should not have taken any cognizance and which should not have been presented to it.

I concur in the result of the learned majority opinion.

HERMAN SAVINGS BANK v. ANNA KROPP, Appellant.

In Banc, December 8, 1915.

1. **APPEAL: Failure to File Abstract: Penalty.** Where appellant has in due time filed with the clerk of the Supreme Court a short-form transcript of the judgment and order of appeal, but has failed to file or serve respondent with a printed abstract of the entire record within the time prescribed by the rules of the court, the order of the court will be a dismissal of the appeal, and not an affirmance of the judgment; and that must be the holding despite the fact that respondent

Bank v. Kropp.

urges that complications may arise as to the liability of sureties on the *supersedeas* bond, if the appeal is dismissed. [Refusing to follow or discuss *Mattenlee v. Mattenlee*, 74 S. W. 889, because it does not appear to have been officially reported or authoritatively promulgated.]

2. ———: ———: Affirmance: Statutory Requirement. The affirmance of the judgment appealed from provided by section 2047, Revised Statutes 1909, was not intended necessarily to follow a failure to file a proper abstract within the time prescribed by the rules of the court. The right to affirmance, as prescribed by that statute, seems to have been made to depend upon a failure of appellant to file a complete transcript or a certificate of the judgment and order of appeal in the appellate court, etc., within the time prescribed by section 2048.
3. ———: ———: ———: Rule of Court. The rules of the Supreme Court made under the direct authority of a statute, have practically the binding force and effect of a statute. And while the court has power to change its rules, the change ought to be in substance, and the rule should not be nullified by a collateral attack.
4. ———: ———: Penalty Fixed by Rule of Court. There being no specific penalties attached by section 2048, Revised Statutes 1909, to a failure of appellant, who has in due time filed a short-form transcript, to file a printed abstract in time, the court is empowered to fix the penalties by rule of court; and Rule 16 fixes the penalty at dismissal of the appeal, or at a continuance to the next term, and not at affirmance of the judgment.
5. ———: Completion: Penalty. While the appeal is not so far completed as to allow appellate review by the filing of a short-form transcript, it is completed within the purview of section 2047, Revised Statutes 1909, so far as concerns the penalty of affirmance therein provided; and having been that far completed, Rule 16 steps in and says the penalty for failure to file a printed abstract shall be a dismissal or a continuance.

Appeal from Franklin Circuit Court.—*Hon. R. A. Breuer*, Judge.

APPEAL DISMISSED.

Hazel & Lay for appellant.

August Meyer and *John W. Booth* for respondent.

FARIS, J.—Separate actions in ejectment and for the balance due upon a note were by consent of parties consolidated and tried in the county of Franklin on change of venue from Gasconade county. From a judgment in the consolidated cause defendant, being cast on both issues, appealed and gave two *supersedeas* bonds in the aggregate sum of \$5000. The case was set for hearing upon our docket at this term for April 26. Appellant duly filed a “short-form” transcript of the judgment and order granting an appeal, but failed and neglected to file thirty days before the case was set for hearing and still fails to file any abstract of the record as required by section 2048, Revised Statutes 1909, and by our rules. [Rule 11 of Rules of Supreme Court.] Thereupon respondent *moved to affirm the case* for failure in this behalf.

Being desirous, as we are advised, to avoid any possible complications which might result in releasing the sureties upon the *supersedeas* bonds aforesaid (Cf. Hill v. Keller, 157 Mo. App. 710), respondent now strenuously insists upon an affirmance of the case and not a dismissal of the appeal, and has filed herein its formal motion to this end.

Since there seems to be no formal decision settling in terms this much mooted question, we deem it wise to investigate it. That the practice is to dismiss the appeal in such a case (McLaughlin v. Fischer, 188 Mo. 546; Crothers v. LaForce, 241 Mo. 365; Manuel v. Railroad, 186 Mo. 499; Whitehead v. Railroad, 176 Mo. 475; Clements v. Turner, 162 Mo. 466; Sanders v. Chartrand, 158 Mo. l. c. 364; Lawson v. Mills, 150 Mo. 428; Foster v. Vernon County, 150 Mo. 316; Halstead v. Stone, 147 Mo. 649; Murrell v. McGuigan, 148 Mo. 334; Walser v. Wear, 128 Mo. 652; Brand v. Cannon, 118 Mo. 595; Cunningham v. Railroad, 110 Mo. 208; Thompson v. Allen, 107 Mo. 479; Snyder v. Free, 102 Mo. 325; Garrett v. Mining Co., 111 Mo.

**Timely
Appeal:
Penalty for
Failure
to File
Printed
Abstract.**

279; *Mississippi Valley Fuel Co. v. Bean*, 152 Mo. App. 703), there can be no manner of doubt, also, that the practice is to do this of our own motion; but the vexing question now here before us is: Have we authority in law, if we desired to do so, to affirm a case on account of the failure of appellant to file an abstract of the record?

The resolving of this question necessitates an examination of the statutes, as also of our rules, permission to make which is given by statute. [Sec. 2049, R. S. 1909.] The applicable part of section 2047, Revised Statutes 1909, is as follows:

“The appellant shall perfect his appeal in the manner and within the time prescribed in the next succeeding section, and if he fails so to do, and the respondent shall produce in court the certificate of the clerk of the court in which such appeal was granted, stating therein the title of the cause, the date and amount of the judgment appealed from, against whom the same was rendered, the name of the party in whose favor the appeal was granted and the time when the appeal was granted, such certificate shall be prima-facie evidence of the matters therein stated, and shall be a sufficient basis for a motion in the appellate court to affirm the judgment so appealed from, and the court shall affirm the judgment, unless good cause to the contrary be shown; and the failure of the clerk to notify the appellant, or his attorney of record, of the completion of the transcript in time to enable him to have the same filed in the appellate court in the time required by law, shall be considered and is hereby declared to be good cause for refusing to affirm the judgment of the lower court on such motion.”

The applicable part of section 2048, Revised Statutes 1909, which we must consider in connection with section 2047, *supra*, reads thus:

“The appellant or plaintiff in error shall cause to be filed in the office of the proper appellate court,

in cases of appeals fifteen days before the first day of the term of such court, and in cases of writs of error on or before the first day thereof, a perfect transcript of the record and proceedings in the cause, or in lieu of such transcript, a certified copy of the record entry of the judgment, order or decree appealed from in said cause, showing the term and day of the term, month and year upon which the same shall have been rendered, together with the order granting the appeal, and shall thereafter, within the time and manner as is now or may hereafter be prescribed by the rules of such appellate court, file printed abstracts of the entire record of said cause in the office of the clerk of such appellate court, and within such time, deliver a copy of said printed abstract to the respondent or defendant in error."

Counsel for respondent insists that the statutory words "the appellant shall perfect his appeal *in the manner and within the time prescribed* in the next succeeding section," require a timely filing of either a perfect transcript, or the filing of *both* a short-form transcript *and an abstract of the record*; and that if both such transcript and such abstract are not filed, respondent (even though appellant has already filed a sufficient short-form, or complete transcript showing the identical facts) may file a certificate of the clerk of the court *nisi* "stating therein the title of the case, the date and amount of the judgment appealed from," etc., and thereby become legally entitled to insist as a matter of right upon the affirmance of the case as permitted by said section 2047. We do not think so; we are of the view that a logical construction of these two sections, of our rules and of the adjudged cases are all against this contention.

The view urged on us loses sight of the facts (1) that respondent does a vain, expensive and useless thing in filing a certificate of the clerk showing the judgment and order allowing an appeal, since all of

these facts are plainly shown by the short-form transcript already filed by appellant; likewise of the fact (2) that by a further provision of this section an affirmance may be avoided by the appellant, among other ways by making the showing that the clerk of the trial court failed to notify the appellant or his attorney of the completion of the transcript, as also of the fact (3) that within the purview of section 2047 the appeal is completed when and as soon as either a short-form transcript, or a complete transcript, is filed within the time in section 2048 limited. Other matters in said section 2048, while in a logical sense pertaining to the perfecting of the appeal, are yet, in a broader sense, mere statutory details making for expedition and convenience in appellate review. So when section 2047 says that the appeal shall be perfected "in the manner and within the time prescribed" in section 2048, it has reference (in so far as the right to affirm upon motion for failure, is concerned) to the filing "in the office of the proper appellate court, in cases of appeals fifteen days before the first day of the term of such court . . . a perfect transcript of the record and proceedings in the cause, or in lieu of such transcript a certified copy of the record entry of the judgment, order or decree appealed from in said cause, showing the term and day of the term, month and year upon which the same shall have been rendered, together with the order granting the appeal." It does not mean that the appeal is not perfected within the purview and purpose of section 2047 till the abstract is filed, for if the appellate court were behind in its docket, the anomalous conditions would be presented of not perfecting an appeal for two or three years after the clerk of the trial court had done all he could do, and allowing appellate courts, if they saw fit, to fix by rule the time of perfecting an appeal at a period subsequent to the argument and submission of the case. By the

terms of section 2047 *an affirmance may always be saved* by showing default of the clerk of the trial court. Could a dismissal of this appeal be now prevented by any showing of the trial clerk's default? Or could an affirmance thereof—granting *arguendo*, our power to affirm—be prevented now by a showing, however clear, of such clerk's default? The answer is obvious and in our view shows conclusively that the affirmance provided for by section 2047 was not intended. necessarily to follow a failure to file a proper printed abstract of the record. By section 2049 we are given power to make rules to carry into effect the provisions of sections 2047 and 2048. We have made these rules. [Rules 11, 12, 13 and 16 of the Supreme Court.] Said Rule 16 reads as follows:

“If any appellant in any civil case shall fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of the respondent continue the cause at the cost of the party in default.”

Till we change the penalty of Rule 16 (since it was made in aid of, and under the direct authority of a solemn statute), it has practically the binding force and effect of a statute. If we are to change it, we ought to change its substance and not nullify it by an indirect collateral attack. There are not in section 2048 any specific penalties attached to a failure to file an abstract in time. We are empowered to fix the penalties by rule of court and we have fixed them at dismissal of the appeal, or at a continuance till the next term. As suggested above, if we saw fit we might, under the broad power to “prescribe the time and manner” within which an abstract of the record should be filed, require it to be filed ten days after the case was set for hearing, instead of thirty days before such setting. So, while the appellant is given an option to file either a complete transcript of the record, or

a short-form transcript *and* a printed abstract of the entire record, it is fairly obvious that while the appeal in the last contingency is not in fact so far completed as to allow appellate review, it is completed within the purview of section 2047 so far as concerns the penalty of affirmance therein provided.

It is urged upon us that this identical point was ruled in favor of the right to affirm for the identical reason here urged, by the Kansas City Court of Appeals in the case of *Mattenlee v. Mattenlee*, 74 S. W. 889. Our examination of that case as it appears reported above shows us that it sustains the position of counsel, but we have been wholly unable to find the *Mattenlee* case officially reported. Whether its publication in the *Southwestern Reporter* was due to an error, and was unauthorized, or whether the opinion was later withdrawn, we do not know. We do find that it is not so promulgated as to be persuasive with us as an authoritative exposition of the law.

We conclude then upon principle and after a most careful examination of the two sections in controversy and of our Rule 16, that while we may have power to make a different rule and to prescribe a different penalty (e. g., even an affirmance of the case), we have not done so; but on the contrary have seen fit to make a dismissal of the appeal, or a continuance of the case at the respondent's option, the only penalties and we ought not to change the penalty, at least till we have formally changed our rule.

This view was taken in the only case we have been able to find wherein this matter of the meaning in this behalf of sections 2047 and 2048 was considered. This is the case of *Sanders v. Chartrand*, 158 Mo. l. c. 364, where it was most appositely said:

"This case is here upon a complete transcript. Therefore the penalty of an affirmance, provided by section 812, Revised Statutes 1899, does not apply. It

is only in cases where the complete transcript, or in lieu thereof a certificate of judgment, is not filed in this court in proper time, that the judgment may be affirmed. A failure to file a proper abstract is punished by the penalties provided by section 813, Revised Statutes 1899, and by the rules referred to, by dismissing the appeal or continuing the case at the option of the respondent."

In this distinction touching the legislative intent as regards these two sections, there is much of logical method; for if an appeal be not completed we could only affirm the judgment below. If *per contra*, the appeal be completed and the case with jurisdiction over it be lodged here, we can dismiss it, and we have dismissed hundreds of cases of our own motion. If the right to affirm then is to be based upon the view that a "short-form" appeal is not completed within the purview of section 2047 till an abstract be filed, then logically we have been wrong in our Rule 16 and wrong in all these hundreds of cases "dismissed for failure," for we have dismissed appeals and therefore cases which were never here and of which we never had jurisdiction.

As we have seen the almost universal practice has been to dismiss the appeal where a failure to file a printed abstract has occurred. There has been found but one case (Clark v. Fairley, 100 Mo. 236) of affirmance where no abstract whatever was filed, and this case is affirmed without any consideration of the reasons for, or the propriety of, the practice. There are a few cases wherein an affirmance has been adjudged where the abstract which was duly filed has been held insufficient. [Long v. Long, 96 Mo. 180; Jayne v. Wine, 98 Mo. 404; Craig v. Scudder, 98 Mo. 664.] But the weight of authority shows the practice to be to dismiss the appeal; and finding this practice to be in accord with the principle, with the statutes as interpreted in Sanders v. Chartrand, *supra*, and with

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our rule, we dismiss this appeal of our own motion. It follows that the motion to affirm should be overruled, and it is so ordered. All of this division concur.

PER CURIAM.—This cause coming into Banc from Division Two, because of the pending there of the same question here involved, was reheard in Banc and the foregoing divisional opinion of FARIS, J., was adopted. *Woodson, C. J., Bond and Walker, JJ.*, concur; *Graves, J.*, concurs in a separate opinion; *Blair and Revelle, JJ.*, dissent.

GRAVES, J. (concurring).—I concur in the views expressed in this opinion. In the case of *J. A. Pullar v. St. Louis and San Francisco Railroad Company* (now pending in this court) I had joined in an opinion expressing different views, whilst the Pullar case was in Division. The Pullar case rather appealed to the equities of the matter. It was urged that a failure to affirm the judgment might preclude action on the appeal bond, and the defendant was a bankrupt. But there is no substance in this contention. It is true the Springfield Court of Appeals has written a case with contrary views on the right to sue upon the bond, but that case and the error of that opinion, are fully discussed by ELLISON, P. J., of the Kansas City Court of Appeals in *Arkansas Valley Trust Co. v. Corbin*, 179 S. W. 484. Judge ELLISON likewise ably discusses the very question we have involved in both this and the Pullar case, i. e., our right to affirm the judgment. He reaches the same conclusion as is reached by our learned brother FARIS, and I am constrained to believe that they have reached the proper conclusion. I therefore concur in this opinion.

MIKE BINE et al. v. JACKSON COUNTY et al.,
Appellants.

In Banc, December 8, 1915.

1. **LOCAL OPTION ELECTION: Number of Petitioners: Comparison With Poll Books.** The petition for a local option election signed by one-tenth of the qualified voters of that part of the county which embraces no city having 2500 inhabitants or more, vests the County Court with jurisdiction to call the election; and if so signed, the court is not without jurisdiction to call the election, on the sole ground that it is not signed by one-tenth of the qualified voters as shown by the poll books of the last general election. The proviso of the statute (Sec. 7238, R. S. 1909) declaring that "the County Court shall determine the sufficiency of the petition presented by the poll books of the last previous general election" simply means that the court shall take the presumptive evidence of the poll books that the names truly set forth the qualified voters who reside in the locality entitled to hold the election. If the petition is in fact signed by one-tenth of the qualified voters of such locality, that is enough. The law confers the right of petition upon the resident qualified voters, not upon the names on the polling lists; and if one-tenth of the resident qualified voters signed the petition, an election ordered by the County Court will not be held invalid, although an order therefor did not recite a comparison of the names of the petitioners with those on the poll books.
2. ———: ———: ———: **Failure of Court.** The right given by the statute to one-tenth of the qualified voters of a local option district to petition for a local option election therein cannot be taken away by the failure or omission of the County Court to look to the poll books as evidence that the petitioners possessed the statutory qualification and residence.
3. **CONSTRUCTION OF STATUTE: Harmonizing Terms.** A construction which defeats the chief object of a statute will never be forced by giving its terms a meaning beyond what is expressly stated. The end had in view, and the paramount intention of the lawmaker, afford a strong reason for harmonizing a statute.
4. **LOCAL OPTION ELECTION: Number of Petitioners: How Determined.** The poll books are not the only method of determining whether a petition for a local option election has been signed by one-tenth of the qualified resident voters of the

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locality, nor does the statute say that they shall be the only test. They are not an infallible enumeration. The proviso only means that, nothing else appearing, the County Court must ascertain from the poll books whether or not the petition is signed by one-tenth of the qualified resident voters; but it does not confine their examination to those books.

5. ———: ———: ———: **Explicit Finding.** An explicit finding by the County Court that the petition for the local option election outside of cities is signed by one-tenth of the qualified voters resident therein, is a substantial compliance with the statute, and (however that fact was ascertained) vested the court with ample authority to order an election and give due notice thereof.
6. ———: **Irregularities.** The courts will not set aside a local option election on account of mere irregularities not essential to its valid holding.

Appeal from Jackson Circuit Court.—*Hon. Frank G. Johnson*, Judge.

REVERSED.

A. L. Cooper, Ross J. Ream and Guthrie, Gamble & Street for appellants.

(1) The county court is a court of record, and, in so far as it acts judicially, its judgments import the same verity, and are as conclusive against collateral attack, as those of any other court. *Jeffries v. Wright*, 51 Mo. 221; *Johnson v. Beazley*, 65 Mo. 256; *Sims v. Gray*, 66 Mo. 616; *Fulkerson v. Davenport*, 70 Mo. 541; *Scott v. Crews*, 72 Mo. 261; *State v. Evans*, 83 Mo. 322; *State ex rel. v. Wooten*, 139 Mo. App. 228; *State v. Gamma*, 149 Mo. App. 704; *State ex rel. v. Thornhill*, 174 Mo. App. 469. (2) The rule of conclusiveness applies to a preliminary finding as to the existence of facts supporting the jurisdiction. *Lingo v. Burford*, 112 Mo. 149; *State v. McCord*, 227 Mo. 526. (3) The mere exercise of jurisdiction conclusively imports a finding of the facts necessary to support the jurisdiction, unless the lack of jurisdiction affirmatively appears upon the face of the record. *Snoddy v. Pettis*

County, 45 Mo. 363; State ex rel. v. Young, 84 Mo. 94; State v. Searcy, 39 Mo. App. 400; State v. Dugan, 110 Mo. 145; State v. Hitchcock, 124 Mo. App. 104. (4) The order of the county court calling the election did not affirmatively show want of jurisdiction for lack of a proper petition. Sec. 7238, R. S. 1909; State v. Searcy, 39 Mo. App. 400; State v. Searcy, 111 Mo. 236; State v. Dugan, 110 Mo. 145; State v. Foreman, 121 Mo. App. 502. (5) It was not necessary for the county court to test the qualification of the petitioners by the last preceding poll books. State v. Carter, 165 S. W. 783; State v. Foreman, 121 Mo. App. 507. (6) The notice of contest was fatally defective for want of any averment that the contestants were polled at the last previous general election. State ex rel. v. Smith, 104 Mo. 667; Bowers v. Smith, 111 Mo. 46; Hale v. Stimson, 198 Mo. 146; Gillespie v. Dion, 18 Mont. 183, 33 L. R. A. 703; 15 Cyc. 401. (7) An election contest does not involve inquiry into the question as to whether a valid election was ever held; but, in contesting the results of the election, the right to hold the election is conceded, and the contest pertains only to the regularity of the proceedings at the election as affecting the rights of the contestant. Sec. 7242, R. S. 1909; Nance v. Kearbey, 251 Mo. 388; Norman v. Thompson, 72 S. W. 64; Lowry v. Briggs, 73 S. W. 1062; State ex rel. v. Tucker, 54 Ala. 210; Commissioners v. Johnson, 145 Ala. 556.

I. B. Kimbrell and L. H. Waters for respondents.

(1) The averment in the contestants' notice, that "they are qualified voters of Jackson county, Missouri, and reside outside the corporate limits of Kansas City and Independence," is a literal compliance with the statute. R. S. 1909, sec. 7244. (2) A contest under Sec. 7242, R. S. 1909, is a direct and not a collateral attack on a local option election. State v. Searcy, 39 Mo. App. 401; Riggins v. O'Brien, 34 Mo. App. 613.

In an election contest the court may look behind the record and decide according to the facts upon any essential question. *State ex rel. v. Ross*, 161 Mo. App. 682; *State ex rel. v. Ross*, 245 Mo. 45; *State ex rel. v. Slover*, 134 Mo. 15. The remedy by contest accomplishes through one plain, practical, summary proceeding all that is necessary to do full and complete justice. *State ex rel. v. Smith*, 104 Mo. 669. Where by statute a new right is given and a new remedy provided, the right can be vindicated in no other way than that provided by statute. *State ex rel. v. Slover*, 134 Mo. 14; *State ex rel. v. Ross*, 245 Mo. 44. The general rule is that remedies expressly provided by statute to enforce rights created by statute are preclusive. *Nance v. Kearbey*, 251 Mo. 387; *State ex rel. v. Spencer*, 164 Mo. 34. If a contest of a local option election under 7242 is a direct attack, appellants' authorities cited in paragraphs 1, 2 and 3 of their brief have no application whatever. (3) The county court on the face of its record and under the evidence was without jurisdiction. (a) The county court shall determine the sufficiency of the petition presented, by the poll books of the last previous general election. R. S. 1909, sec. 7238. Section 7238 provides for the qualifications of petitioners upon a petition for the holding of a local option election, and for an official place to obtain the number required, or a basis of computation of such number. *State v. Carter*, 257 Mo. 85. The law further provides that the county court shall ascertain who are qualified voters by the poll books of the last previous general election. *State v. Foreman*, 121 Mo. App. 507; *State ex rel. v. Bird*, 108 Mo. App. 163; *State ex rel. v. Baldwin*, 109 Mo. App. 573. The court clearly did not "ascertain the qualification of the petitioners as provided by statute," nor did the court obtain the number required from the poll books of the last previous general election which was the basis of computation of such number. The court found and decided that the

petition was signed by one-tenth of the qualified voters then residing in the county. It is a case where *expressio unius est exclusio alterius* applies. The finding did not authorize the order. *Adv. Co. v. Castleman*, 165 Mo. App. 578; *Bank v. Lumber Co.*, 102 Mo. App. 82. We do not regard that it was necessary for the record of the county court to show how it ascertained the qualifications of the petitioners so long as it does not show they pursued an unauthorized method. *State v. Foreman*, 121 Mo. App. 508. If the court in its finding had omitted the sentence "who now and at the time of the petition resided in the county outside the cities of Kansas City and Independence," it would be assumed that the court did its duty and ascertained the qualifications of the petitioners as required. But this record is not silent, and the testimony we offered does not contradict the record. (b) The offered testimony, if it was competent and material, should be considered as a part of the evidence on this appeal. We offered to prove by the judges of the county court, who ordered the election in this case, that the sufficiency of the petition was not determined by the poll books of the last previous general election. Counsel for appellants conceded they would testify pursuant to the offer. The offer to prove a material fact by a competent witness must stand for the fact itself. *State v. Steifel*, 106 Mo. 134; 1 *Thompson*, *Trials*, sec. 685; *Neff v. Neff*, 20 Mo. App. 186; *County v. Hile*, 112 U. S. 186; *Eschback v. Hurtt*, 47 Md. 61; *Robinson v. State*, 1 Lea (Tenn.), 673; *State v. Kelier*, 263 Mo. 552. (c) The record shows that the petition was referred to the county counselor, an attorney for appellant, who prepared the court's order, and reported that he had not determined the sufficiency of the petition by the poll books. We offered to prove by Mr. Smith and three other gentlemen who assisted him, that they compared the petition with the poll books (under the court's order), and found 387 petitioners whose names

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were not on the poll books of the last previous general election, and that there were 6407 votes cast as shown by the poll books at the last previous general election outside of Kansas City and Independence. (4) It was necessary for the court to test the qualifications of the petitioners by the poll books of the last previous general election. *State v. Carter*, 257 Mo. 85; *State v. Foreman*, 121 Mo. App. 507; R. S. 1909, sec. 7238.

Rozelle, Vineyard & Thacher, Frank A. Boys and James K. Houghton, amici curiae.

OPINION.

BOND, J.—This is a contest of a local option election held on the 22nd of August, 1914, in that portion of Jackson county outside of Kansas City and the city of Independence. A canvass of the votes showed that a majority of five hundred and thirty-six were cast against the sale of spirituous and intoxicating liquors. Thereupon Mike Bine filed a notice of contest of said election on the following grounds.

“That said petition was not signed by one-tenth of the qualified voters of said county outside of the corporate limits of said cities who voted at the last previous general election and whose names appear on the poll books of said election, and the county court did not so find in its order.

“That said petition was otherwise defective and insufficient to confer jurisdiction on said county court to make said order.

“That the order of the county court for said election shows on its face that said court did not determine the sufficiency of said petition by the poll books of the last previous general election as the court was required to do by section 7238, Revised Statutes 1909.

“The order of the court under and in pursuance of which said election was held expressly states that

the court found and adjudged that said petition was signed by one-tenth of the qualified voters of Jackson county, Missouri, who now (July 23, 1914) and at the time of the filing the petition (July 14, 1914) reside outside of the corporate limits of the cities of Kansas City and Independence, and who are qualified to vote for members of the Legislature in said county, and that said order is therefore a nullity.

“Contestants, for grounds and causes aforesaid, ask that the court declare and adjudge that the petition filed in the county court as aforesaid was defective and insufficient to confer on the county court jurisdiction to make any order in the premises, and that the said order of the county court was not authorized by law and was and is a nullity, and that said election be declared to have been held without proper authority and be set aside and for naught held.”

Jackson County filed an answer, wherein after admitting the holding of the election and the majority vote and denying other allegations in the notice of contest, it averred that the petition presented to the county court on which it based its order for the election was signed by one-tenth of the qualified voters residing in said county outside the cities of Kansas City and Independence and whose names appear on the poll books of the last previous general election.

The trial judge announced that the petitioners must not only have been qualified voters but must also have been included in the poll list of the voters at the last previous general election, and that in his view the county court's order for the election showed that the county court had not determined the character and number of the petitioners for the holding of the election by a comparison with the poll books of the last previous general election.

After permitting the parties to make offers of testimony on the issue joined, and after considering the petition filed with the county court for the calling

the election and the finding and judgment of the county court (which orders so far as necessary will hereafter be set out), the trial court rendered a judgment in favor of the contestants and against Jackson County, reciting therein as grounds of this finding that the county court failed to determine the sufficiency of the petition for the election as required by the statutes of the State of Missouri, and hence, was without jurisdiction to order the election, and that the election so held was a nullity. From this judgment the contestee, Jackson County, Missouri, perfected an appeal to this court.

I.

The judgment of the trial court can only be upheld, if at all, by a concurrence on our part with his construction of the findings of the county court on the petition for an election upon which it based its order calling the election; and, the section of the statute governing the calling of local option elections. The pertinent parts of the section of the statute are, to-wit:

"Section 7238. Upon application by petition, signed by one-tenth of the qualified voters of any county who shall reside outside of the corporate limits of any city or town having, at the time of such petition, a population of twenty-five hundred inhabitants or more, who are qualified to vote for members of the Legislature, in any county in this State, the county court of such county shall order an election to be held in such county at the usual voting precincts for holding any general election for State officers . . . to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of such county lying outside of such corporate limits of such city or town. . . . Provided, further, that the county court shall determine the sufficiency of the petition presented by the poll books of the last previous general election."

The finding of the court upon the petition is, to-wit:

“The court doth find and adjudge that said petition is signed by one-tenth of the qualified voters of Jackson County, Missouri, who now and at the time of such petition reside outside the corporate limits of the cities of Kansas City and Independence in said county and who are qualified to vote for the members of the Legislature in said county.”

The crux of this case is whether the record shows the county court was without jurisdiction to order the election. It is not denied that the petition was in proper form and that the number of the petitioners was greater than ten per cent of the number of voters as shown in the poll books of the last general election. But it is contended by respondent that the jurisdiction of the county court to order a local option election is dependent on a previous finding and adjudication by it that the names contained in a petition for such election must be one-tenth of the qualified voters as they are set forth in the poll books of the last previous general election, and that the court would have no jurisdiction to order such election upon a petition signed by one-tenth of the qualified voters of the part of the county entitled to vote at such election.

It is further claimed that the foregoing finding of the county denuded it of any jurisdiction and that the election thereafter held was void.

We are unable to accept either the premises or the conclusion of the respondent. The above quoted statute makes but one condition as to the sufficiency of the petition, which is that it shall be signed by one-tenth in number of the qualified voters who are qualified to vote for members of the Legislature. No question can exist under these terms of the statute, that a petition thus signed and presented to the county court is all that can be done by the petitioners in their assertion of their statutory right and invested the county

court with jurisdiction to make a finding and order an election in the manner prescribed in section 7238 of the Revision of 1909. Being thus clothed with power to adjudge the sufficiency of the petition and order an election, the statute further points out to the county court a ready means of determining the sufficiency of the petition by recourse to the poll books of the last general election. All that the language of the provision of the statute to that effect means (in view of the fundamental requisite that the signers of the petition shall be qualified voters who shall reside in the county) is that the county court shall take the presumptive evidence of the poll books that the names truly set forth the qualified voters who reside in the locality entitled to hold the election. It would be repugnant to the primary prerequisite of qualification and residence which is made the basis of the right to petition for the election, to hold that the right thus given and to secure which the law was enacted, could be taken away from the citizens who had in all respects complied with the statute by the omission of the county court to look to the poll books as evidence that the petitioners possessed the statutory qualification and residence.

The law confers certain rights in respect to the holding of such elections upon the qualified voters and residents, not upon the mere names contained in the polling list. If the latter proposition was true then a petition which was a replica of one-tenth of such names would be sufficient although the actual facts were shown to be that the names on the petition were not one-tenth of the qualified voters then residing in the county. The poll books may often exceed the qualified voters owing to death and removals. In that event such an election could not be called without obtaining a greater number of signers to the petition than one-tenth of the actual voters. This, however, would be absurd under the statutory hypothesis that one-tenth of the resident quali-

fied voters have the absolute right to petition for the calling of such an election and that upon a finding of that number of signers the court must order the election. It is clear, therefore that the purpose of the statute was simply to point out, as an aid to the finding of the court, an accessible and presumptively correct list of voters which it could use without further inquiry as evidence of the number of qualified voters then living in the county.

This interpretation harmonizes the section as an entirety and avoids a construction which would defeat its specific object, and is in accordance with the time-tested rule that the end had in view and the paramount intention of the lawmaker, affords a strong reason for harmonizing the language of the statute. Or put differently, a construction which defeats the chief object of the law will never be forced upon it by giving its terms a meaning beyond what is expressly stated. No such necessity arises in this case, for although the proviso requires that the county court "shall determine the sufficiency of the petition by the poll books," yet it does not in *totidem verbis* say that this shall be the *only* method of ascertaining who are the qualified voters. We know judicially, and the Legislature knew, that the poll books are not, and cannot in the nature of things be, an infallible enumeration of the qualified voters in any county where registration previous to voting is not prescribed by law. What the provision intended was that nothing else appearing the county court must find by poll books whether or not the petition was sufficient to show that it was signed by one-tenth of the qualified voters residing in the county. For it was to them the statute gave the right by proper application to compel the calling of an election. To simplify the investigation which the county court is directed to make and to further the object of the petitioners to put the issues of local option before the people, the statute inserted the proviso that the county

court should consider the prima-facie evidence of the poll books as to the qualifications and number of the petitioners, but it nowhere in words or by necessary implication confined the view of the county court to the poll books alone.

Our conclusion is that the explicit finding of the county court in the case at bar that the petitioners embraced one-tenth of the qualified voters residing in the county, was a substantial compliance with the statute and vested that court with ample authority to order an election and give due notice thereof, as the record shows was done. There is nothing to the contrary in the remark contained in *State ex rel v. Carter*, 257 Mo. l. c. 85. The learned writer of that opinion was construing another statute and remarked *en passant* that the statute then under review, unlike the present statute, contained no language referring to an official place or basis for computation of petitioners for an election, but he wholly refrained from intimating that the court under the present statute could look to nothing as evidence of the number and character of the petitioners except the poll books. On the contrary the whole trend of the correct reasoning in the case cited, is in harmony with what has been said heretofore in the discussion of the meaning of the present statute.

II.

It must be borne in mind in considering the present statute that its main provisions have been the law since 1887; that its constitutionality has been established against continuous and many-sided attacks; that it is the embodiment of enlightened public policy, and permits the people to decide for themselves in what locality spirituous and intoxicating liquors shall be sold. The great object of the law was to make this issue one quickly determinable by the preponderance of local public sentiment; hence, the statute has pro-

vided for its prompt submission to the will of the people as expressed in the ballot box.

In the instant case there is not the faintest suggestion that the result of that election does not reflect the unbiased choice of the voters in that part of Jackson county outside the cities of Kansas City and Independence. It is not denied that the opponents of the proposition secured every hostile ballot obtainable in the territory, nor that the election was free from any form of attack for fraud or unfairness, nor that it expresses the deliberate choice of the people.

If the genius of the English chart of liberty found concrete expression when twelve men were put in a jury box, then it is no less true that the highest ideal of the American Republic is realized when the thought of the people is expressed in an uncorrupted ballot which has been honestly counted and truthfully announced. The sanctity of the ballot box is the basic principle of the evolution of all free government; for all of its powers, faculties and activities, for good or evil, are directed and controlled by the votes of an enlightened citizenry. The whole philosophy of liberty of thought in life and society finds its *raison d'être* in the sacred right of each citizen to express his mind and purpose by his voluntary ballot. When this is done not only is the highest duty of citizenship performed, but the dynamic which moves the entire machinery of government in a free State or community is instantly and resistlessly applied, and the "will of the people expressed in the ballot box, becomes the supreme law." The choice of the people thus expressed should be subject to no attack which does not go to the integrity of the election.

It has been well said in a leading case in this State, "Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the

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minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud and have not interfered with a full and fair expression of the voter's choice." [Bowers v. Smith, 111 Mo. 45.]

None of the contentions of learned counsel for respondents go to the vital question of the fairness and the authoritative force of the election by the people of a part of Jackson county whereat it was decreed that spirituous and intoxicating liquors should no longer be sold in that locality. It is not the province of the court to set aside that result on account of mere irregularities not essential to the valid holding of the election. The contrary view was taken by the learned trial judge. This judgment was manifestly erroneous and should be, and is, reversed. All concur except *Woodson, C. J.*, not sitting.

THE STATE ex rel. A. M. CONWAY, Appellant, v.
F. B. HILLER et al., Constituting State Board of
Health.

Division One, December 8, 1915.

1. **APPELLATE JURISDICTION: State Board of Health a Party.** The jurisdiction of the members of the State Board of Health is coextensive with the State, and hence they are classed as State officers; and an appeal from the judgment of a circuit court quashing a writ of *certiorari* issued against the members of said board on behalf of a physician whose license to practice medicine had been revoked by them, is to the Supreme Court.
2. **CONSTITUTIONAL QUESTION: Raised In Motion for New Trial: No Bill of Exceptions.** An attack upon the validity of a certain statute, made for the first time in the motion for a new trial, if the abstract contains no part of the bill of exceptions, cannot be considered on appeal. A motion for a new trial is not a part of the record proper, but a part of the bill of exceptions, wherein must be preserved an exception to the overruling of the motion; and if the abstract contains no bill of exceptions, any assignment made in the motion for a new trial alone cannot be considered on appeal, although that motion is printed in the abstract as a part of the record proper.
3. **STATE BOARD OF HEALTH: Review of Action: No Bill of Exceptions.** Notwithstanding the fact that appellant's abstract does not contain a bill of exceptions and the validity of the statute under which his license to practice medicine was revoked, raised for the first time in the motion for a new trial filed in the circuit court, cannot be considered on appeal, the duty still remains on the court to determine the legality of such revocation upon the record before the State Board of Health, and certified upon writ of *certiorari* to the circuit court.
4. **———: Review of Evidence: Certiorari.** As a general rule the writ of *certiorari* brings up only the record proper of the tribunal to which it is addressed, and does not bring up the evidence; but in a case in which the State Board of Health has revoked the license of a physician, he may have the proceedings of said board reviewed under the provisions of section 8317, Revised Statutes 1909.

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5. ———: ———: ———: Questions for Review. Where the evidence and record before the State Board of Health have upon *certiorari* been certified to the circuit court, and the decision of the board sustained and the writ of *certiorari* quashed, two propositions are presented for determination on the record made before the board: (a) Does the complaint filed before the board state a good cause of action for revoking relator's license by the board under the statute (Sec. 8317, R. S. 1909); and (b), Was the evidence adduced before the board sufficient to sustain the charges contained in the complaint and to warrant the board in revoking relator's license and in inflicting the penalty entered?
6. **PHYSICIAN: Grounds for Revoking License: Dishonorable Conduct.** Allegations in the complaint and proof showing that defendant, in a local option town and county, in the course of six weeks filled out 778 blank prescriptions for whiskey alone, to be used as a beverage, by inserting in each of them the name of the purchaser, signing his own name thereto as a physician, and charging and receiving therefor twenty-five cents for each prescription so made out and signed, establish the charge of "guilty of unprofessional and dishonorable conduct," since every such prescription constituted a crime against the State, and authorized the State Board of Health to revoke, for a period of ten years, his license, or other right to practice medicine, however derived.

Appeal from Cole Circuit Court.—*Hon. John M. Williams*, Judge.

AFFIRMED.

Sebastian & Sebastian for appellant.

(1) The license of a practicing physician is a valuable privilege and property right, which can only be revoked by due process of law. *State ex rel. v. McElhanney*, 246 Mo. 606. (2) The State Board of Health can only revoke a physician's license, for unprofessional and dishonorable conduct, when the act specified comes clearly within the definition of Sec. 8317, R. S. 1909. *State ex rel. v. Robinson*, 253 Mo. 287. (3) This statute is highly penal and must be strictly construed. A physician cannot be held to have

violated its provisions unless his acts come within the letter and the spirit of the law. Bishop on Written Law, secs. 189 and 194; State v. Balch, 178 Mo. 392; State v. McMahan, 234 Mo. 614. (4) Where a statute specifically names several matters or things which shall be governed by its provisions, and then by general language undertakes to include other acts and things, not specifically named, it must be construed as to apply only to the things or acts of the same general nature as those set out. St. Louis v. Kaine, 180 Mo. 309; State ex rel. v. Berryman, 142 Mo. App. 373; State ex rel. v. Robinson, 253 Mo. 287. (5) The Constitution of this State vests the power to make law in the General Assembly. Article 16, section 1, and article 3 prohibit executive officers from performing legislative functions. The maxim, *Delegata potestas non potest delegare*, is fully expressed in these provisions of the Constitution. Cooley on Constitutional Law (5 Ed.), p. 139. (6) The writing of prescriptions for whiskey is not one of the acts designated by the statute as unprofessional or dishonorable conduct, nor is it one of the same general nature as the things definitely set out. State ex rel. v. Robinson, 253 Mo. 271; 30 Cyc. 1555. (7) If it could be contended that the State Board of Health could make the writing of prescriptions for whiskey unprofessional or dishonorable conduct, then there is nothing in the record of this case to show that they had ever undertaken to do so. The rule is, in such cases, that the complaint must allege and prove that the offense which is the basis of the complaint is one which is violative of the statute. The revocation of relator's license to practice medicine was without authority or sanction of law. Board v. Eisen, 123 Pac. 52; McCommer v. Board of Health, 8 L. R. A. (N. S.) 58; State ex rel. v. Kellogg, 36 Pac. (Mont.) 957.

John T. Barker, Attorney-General, and *W. T. Rutherford*, Assistant Attorney-General, for respondents.

(1) A constitutional question must be raised at the first opportunity, else it is waived. The first opportunity in this case was in relator's application for the writ. Raising the question for the first time in the motion for a new trial was too late. *Sheets v. Insurance Co.*, 226 Mo. 617; *Hartzler v. Street Ry. Co.*, 218 Mo. 564; *Lohmeyer v. Cordage Co.*; 214 Mo. 687. (2) The party asserting the unconstitutionality of a statute must point out the specific provision of the Constitution violated. *Lohmeyer v. Cordage Co.*, 214 Mo. 688; *Excelsior Springs v. Ettenson*, 188 Mo. 129; *Davis v. Thompson*, 209 Mo. 196; *Independence v. Knoeper*, 205 Mo. 342. (3) Section 8317, R. S. 1909, includes acts other than those specifically named, as unprofessional or dishonorable conduct. *People v. Apfelbaum*, 251 Ill. 22; *Berry v. State*, 135 S. W. 1; *Morse v. State Board of Med. Ex.*, 122 S. W. 446; *Meffert v. Packer*, 1 L. R. A. (N. S.) 814; *Meffert v. Packer*, 195 U. S. 625; *State ex rel. v. Goodier*, 195 Mo. 556; *Spurgeon v. Rhodes*, 167 Ind. 11; *Wolf v. State Board Med Ex.*, 109 Minn. 360; *State v. Board*, 34 Minn. 387; *State v. Board*, 32 Minn. 324; *State Board v. McCoy*, 125 Ill. 289; *State Board v. Roy*, 48 Atl. 802; *In re Newell Smith*, 10 Wend. 449; *State ex rel. v. Hathaway*, 103 Mo. 29. (4) Section 8317 is not unconstitutional because it authorizes the State Board of Health to revoke a license to practice medicine for unprofessional or dishonorable conduct. *People v. Apfelbaum*, 251 Ill. 22; *Berry v. State*, 135 S. W. 1; *Oil Co. v. State*, 48 Tex. Civ. App. 179; *Morse v. State Board of Health*, 122 S. W. (Tex.) 448. (5) A license to practice a profession is not a contract. *State v. Gazlay*, 5 Ohio, 22; *Cohen v. Wright*, 22 Cal. 317; *Ex parte Yale*, 24

Cal. 242; Lanquille v. State, 4 Tex. App. 320; Simmons v. State, 12 Mo. 279; State ex rel. v. McIntosh, 205 Mo. 636; State ex rel. v. Gregory, 83 Mo. 123; State v. Hathaway, 115 Mo. 36; State v. Davis, 194 Mo. 501; State ex rel. v. Goodier, 195 Mo. 551; State v. Doerring, 194 Mo. 398. (6) The Board of Health may revoke a license for the same causes for which it may refuse to issue it. Sec. 8317, R. S. 1909; State ex rel. v. Goodier, 195 Mo. 560; Meffert v. State Board of Med. Ex., 1 L. R. A. (N. S.) 816, 195 U. S. 625; People v. Apfelbaum, 251 Ill. 25. (7) The granting or refusing to grant a license to practice medicine, or the revocation thereof by the board, is not the exercise of judicial power. Spurgeon v. Rhodes, 167 Ind. 12; State ex rel. v. Goodier, 195 Mo. 560. (8) The findings of a medical board in a proceeding to revoke a physician's license are conclusive upon the courts. 3 Cyc. 1557; Meffert v. State Board of Med. Ex., 1 L. R. A. (N. S.) 816, 195 U. S. 625; Munk v. Frink, 116 N. W. 528; Walker v. McMahan, 116 N. W. 528. (9) The practice in revocation proceedings before a medical board is more flexible than that allowable in the courts, and any evidence which tends to prove or disprove the point in issue may be introduced, although not the best evidence which might be had. 30 Cyc. 1557; Traer v. State Board Med. Ex., 106 Iowa, 559. (10) The doctrine of *ejusdem generis* is only a rule of construction to be applied as an aid in ascertaining the legislative intent, and does not control where it clearly appears from the statute as a whole that no such limitation was intended. 36 Cyc. 1120; State v. Smith, 233 Mo. 257; Henderson v. Railroad, 81 Mo. 607; 2 Lewis's Sutherland on Stat. Const. (2 Ed.), secs. 363, 364, 437; Grimes v. Reynolds, 184 Mo. 698. Of the legislative intent: Darlington L. Co. v. Railroad, 216 Mo. 671; Clark v. Railroad, 219 Mo. 524; Glaser v. Rothschild, 221 Mo. 180; Scott v. Royston,

223 Mo. 631; Fruin v. Meredith, 145 Mo. App. 586; Hicks v. McCown, 144 Mo. App. 544; Granitoid Co. v. George, 150 Mo. App. 650; Louisiana Pur. Ex. v. Schnurmacher, 151 Mo. App. 601; Hawkins v. Smith, 242 Mo. 688; Spicer v. Spicer, 155 S. W. 382; Blanchard Co. v. Hamblin, 162 Mo. App. 242; Christie L. & P. Co. v. Hamblin, 144 S. W. 882; State ex rel. v. Seehorn, 246 Mo. 568; State ex inf. v. Amick, 247 Mo. 271; Pub. Co. v. McNichols, 153 S. W. 562; Rodgers v. Nat. Council, 155 S. W. 875; State ex inf. v. Railroad, 238 Mo. 605; State v. Robinson, 163 Mo. App. 221; Herberg v. Railroad, 164 Mo. App. 514; Gantt v. Brown, 238 Mo. 560; State v. Schenk, 238 Mo. 429; Moon v. Western U. Tel. Co., 164 Mo. App. 175; Shohoney v. Railroad, 231 Mo. 157; State ex inf. v. Oil Co., 218 Mo. 354. Of the doctrine of *ejusdem generis*: Ex parte Smith, 231 Mo. 119; State v. Eckhart, 232 Mo. 52; Warner v. Cartersville, 142 Mo. App. 127; State v. Smith, 233 Mo. 257; State ex rel. v. Harter, 188 Mo. 528. (11) A license to practice medicine may be revoked for acts that were not grounds for revocation at the time they were committed, but were afterwards made so by statute. Meffert v. State B. of Ex., 1 L. R. A. (N. S.) 818, 195 U. S. 625; State Board of Health v. Roy, 22 R. I. 538; State v. Schaffer, 129 Wis. 465. (12) The portion of the statute making unprofessional or dishonorable conduct a ground of revocation of a license to practice medicine is reasonable, definite and certain. People v. State Bd. Health, 125 Ill. 289; State ex rel. v. State Med. Ex., 34 Minn. 391; State ex rel. v. Goodier, 195 Mo. 551; State v. Med. Ex. Bd., 32 Minn. 324; Aiton v. Medical Ex., 13 Ariz. 358; Wert v. Clutter, 37 Ohio St. 350; Forman v. Board of Health, 162 S. W. (Ky.) 798; Richards v. Simpson, 47 L. R. A. (N. S.) 915; People ex rel. v. Reid, 136 N. Y. S. 430; State ex rel. v. Board of Health, 103 Mo. 283; Meffert v. State Bd. Med. Ex., 1 L. R. A. (N. S.) 811, 195 U.

S. 625; *People v. Apfelbaum*, 251 Ill. 22; *Berry v. State*, 135 S. W. 631; *Morse v. Board Med. Ex.*, 122 S. W. 448; *Spurgeon v. Rhodes*, 167 Ind. 11; *Wolf v. Board Med. Ex.*, 109 Minn. 360; *State v. St. Ry. Co.*, 146 Mo. 167; *Kennedy v. Board of Reg. Med.*, 108 N. W. 730.

RAILEY, C.—Appellant Conway filed in this court an abstract of record, and the Attorney-General has filed a counter-abstract of record. It appears from appellant's abstract that on April 27, 1910, Emmett McDonnell and two other citizens of Boone county, Missouri, filed complaint before the State Board of Health against said Conway, who was a physician, authorized to practice medicine in said county, charging him with *unprofessional* and *dishonorable conduct*. The petition to said board specified the grounds on which they sought to have the license of said Conway revoked and will be referred to hereafter. A copy of this complaint was served on Dr. Conway and a hearing was had before the State Board of Health in Jefferson City, Missouri, on May 24, 1910. Dr. Conway appeared before the aforesaid board and objected to the hearing for the alleged reason that said board of health was without authority or jurisdiction to hear or determine the charges made against him.

A number of witnesses were introduced by the complainants and examined on the part of the prosecution. Their evidence tended to sustain the specifications that Dr. Conway had written a large number of *whiskey* prescriptions which called for no other ingredients than whiskey, and which were used as a beverage instead of medicine. He had charged twenty-five cents apiece for each prescription. No evidence was offered in behalf of Dr. Conway, and said board, after the hearing aforesaid, annulled and held for naught, for a period of ten years, Dr. Conway's right,

permit and license to practice medicine in the State of Missouri.

At the July term, 1910, Dr. Conway, as relator, filed in the circuit court of Cole County, Missouri, a petition for a writ of *certiorari*, against the members of the State Board of Health, and set out in said petition the original complaint and all other proceedings alleged to have taken place before said board, leading up to his conviction on the 27th of July, 1910.

A writ of *certiarari* was issued by the Cole Circuit Court, directed to the members of the State Board of Health, commanding them to have before the circuit court of said county, on the 3rd of August, 1910, the complaint and charges in the matter aforesaid, together with all the records and proceedings of said board, and a complete transcript of all the evidence pertaining to the revocation of said Conway's license to practice medicine in Missouri, etc. This writ was duly served upon the members of said board, and they accordingly made return to said circuit court of all their proceedings, including petition, all papers filed with them, and all the evidence taken by them, together with their findings and orders. Thereupon, the Attorney-General filed a motion in the circuit court to quash the writ of *certiorari*, for the reasons alleged therein. Said motion to quash was sustained by the circuit court, and the finding of the State Board of Health in revoking the license of Dr. Conway to practice medicine and surgery in the State of Missouri was sustained. The writ of *certiorari* was dismissed and for naught held. A general judgment was rendered in favor of the State Board of Health and all costs incurred in said proceeding taxed against relator Conway.

On the same day of rendition of judgment, appellant's abstract recites that he filed a motion for a new trial, and that the same was overruled. It likewise re-

cites that an affidavit for appeal was filed and an appeal granted relator to the Supreme Court of Missouri. It also recites that the court granted relator leave to prepare and file his bill of exceptions before or during the first day of the July term. Said abstract contains the following:

“Within the time allowed by the court, relator presented his bill of exceptions, which was duly signed, sealed, and by order of record, filed in this case and made a part of the record thereof.”

No bill of exceptions is set out in the record, nor is there anything contained therein, which indicates that any of the other printed matters, in the abstract of record, *were incorporated in or made a part of said bill of exceptions*. None of the proceedings or evidence set out anywhere in the record is said to be contained in said bill of exceptions. There is nothing in the abstract of record indicating that any matters of *exception* are contained in the bill of exceptions. The record *proper* purports to contain the motion for a new trial, and an alleged exception to the overruling of same, but none of these matters appear in the alleged bill of exceptions. The abstract filed by appellant sets out an incomplete synopsis of the testimony heard by said board, but no part of same appears in the bill of exceptions, nor is it called for therein.

The counter-abstract of respondents contains substantially the testimony as given before the board, and said testimony sustains, in the main, the charges and specifications contained in the complaint before said board.

We here state a brief synopsis of the specifications contained in said complaint:

Said McDonnell, Stevens and Goldsberry, citizens of Columbia, Missouri, charged, that one A. M. Conway had been for many years a practicing physician, located in Columbia, Missouri, and that he be-

came a registered physician on the 17th day of August, 1874, under the Acts of said year at page 111; that on said date, he registered as such physician, with the clerk of the county court of Boone county, Missouri. For their complaint; they charge, that said Conway was then, and for a long time past had been, guilty of *unprofessional* and *dishonorable conduct* in the following particulars, to-wit:

1. That soon after the adoption of the Local Option Law in the city of Columbia, Missouri, which occurred on the 5th day of February, 1908, the defendant secured an office in the Orear Building in said city; that prior to said time the defendant had no practice and had been making his living by peddling teas, coffees and spices; that within a very short time after opening an office as aforesaid, the stairway and hall of said building was frequented by negroes, inebriates, loafers, objectionable and offensive persons going to and from defendant's office in quest of and obtaining perscriptions for whiskey; that his office was more or less crowded with such applicants for whiskey prescriptions at all hours of the day and until late at night, and at times on Sunday; that by reason of the noise and offensiveness of the aforesaid conditions, other tenants occupying the second and third floors of said building complained to the owner thereof and protested against further occupancy of said building by this defendant and threatened to abandon their leases if defendant was permitted to remain, whereupon the owner terminated defendant's tenancy and procured his removal from said building; that this defendant then obtained permission from the private owner to open an office in the old city police court room in a building until a short time prior thereto occupied by the City of Columbia for police headquarters, jail, and water and light office; that after some time defendant moved his office to the ground floor of

said building in a room located on a side street and abutting on an alley next to a livery stable, a place wholly unfit and unsuited in every respect to a legitimate medical practice and within surroundings exceeding well adapted to writing illegal whiskey prescriptions; that defendant continues now to maintain such office and has no apparent medical practice other than the writing of whiskey prescriptions.

2. That during a portion of the year 1909, the defendant made his home with a relative, one F. M. Lowery, and occupied an upstairs room as a bed chamber; that defendant placed, or had placed, against the side of the house, a ladder extending up to the window of defendant's room; that a great many persons were seen and known to have climbed up said ladder to defendant's window and procured whiskey prescriptions from him; this practice became so annoying to the said F. M. Lowery that he drove defendant from his home.

3. That until recently there has been located in the city of Columbia a drug store known as "The West End Pharmacy;" that said drug store was formerly owned and operated by Oscar Barrett, but that in the month of January, 1910, said Oscar Barrett was prosecuted for violations of the Local Option Law and his store closed by the authorities; that said store was soon thereafter, within a few days, re-opened under the management of one Ollie Tyson, who continued to conduct the business from the 1st day of February, 1910, until the 14th day of March, 1910, when said store was again closed by the authorities for like violations, and the said Ollie Tyson, under an arrangement with the authorities, turned over all prescriptions filled by him in said store from the 1st day of February, 1910, until the 14th day of March, 1910; *that during said month of February, 1910, there were filled at said store, 561 prescriptions, of which number*

544 were written by the defendant and filled by said store and were for one pint of whiskey each, without any other ingredient; that from the 1st day of March, 1910, to the 14th day of March, 1910, said store filled 242 prescriptions, of which 234 were written by this defendant and were for one pint of whiskey each, without any other ingredient; that while said store was running unmolested by the authorities the defendant was known to frequent said store and had made as many as seven or eight trips a day thereto; that defendant is known, in addition to the business done through the above named store, to have issued a large number of other prescriptions which were filled at other drug stores.

4. That on the 26th day of March, 1910, this defendant issued a prescription to a negro, Grant Gilmore, without having made any examination whatever of said negro, said prescription being issued for one pint of whiskey to be used as a beverage, and for which said negro paid the sum of twenty-five cents; that on said date last named, the defendant issued for one William Douglass, also a negro, a prescription for one pint of whiskey to be used as a beverage, without having made any examination of said negro, and for which prescription said negro paid defendant the sum of twenty-five cents; that on said occasion there were so many applicants at defendant's office for prescriptions that they had to line up and wait their turn, there being as many as seven or eight in line at once; that defendant almost invariably asked the applicant only for his name and gave him the prescription without any further question or examination; that most of the applicants for prescriptions were negro laborers, returning from their daily labors with their dinner pails on their arms and apparently in the best of health; that this defendant had blocks of prescriptions for one pint of whiskey already filled in, with the exceptions of his

signature, the date and the name of the party to whom the prescription was to be issued.

5. That this defendant has solicited patronage of the character set forth in this complaint; that he has been known to give numbers of prescriptions to parties, said prescriptions being issued in blank or to fictitious persons, and distributed to divers persons unknown to defendant and not seen or examined by him.

Complainants further state that by the aforesaid acts of the defendant the community has been long suffering; that his conduct is a menace to the morals of our people; that the truth hereof they stand ready to prove. They therefore pray that the license, or other right to practice, however derived, of the said A. M. Conway, be revoked and for naught held.

As heretofore stated, upon the filing of said complaint, appellant Conway was cited before the aforesaid board, and appeared in answer to said citation. The following witnesses were introduced before said board in behalf of the prosecution, to-wit: Emmett McDonnell, L. T. Searcy, J. A. Stewart, Dr. Woodson Moss, Dr. J. E. Thornton, F. G. Davis, Dr. N. D. Robnett, R. M. Wyatt, Jesse M. Whitesides, Dr. A. E. Kampschmidt and John L. Henry.

It appears from the abstract of record filed herein by the Attorney-General, and which has not been controverted, that Emmett McDonnell testified before said board as follows:

He was acquainted with relator and had known him four or five years; that immediately after local option went into effect in Boone county, relator opened an office in Columbia, Missouri, for the practice of medicine and that prior to that time he had been engaged as an agent selling some kind of groceries for a grocery firm; that he lived in the neighborhood of Dr. Conway and that the latter's reputation for pro-

fessional conduct as a physician was bad; that on the evening of March 26th, previous to the trial, he visited relator's office at two different times. He saw relator offer a paper to Hopp, and saw that it was a prescription for which relator received fifty cents; that it had relator's name signed to it; that on the same evening he was in Dr. Conway's office and there were about half a dozen negroes lined up, and relator was writing prescriptions for them. He just asked their names and later on, others came in, to the number of ten, and relator was as busy as he could be. He never looked up, but would ask, "What is your name?" and they would tell him their names. *He had the prescription already filled out.* Witness was within three or four feet of relator while he was writing the prescription which had been previously filled out, and he would put their names in the prescription and would sign his name to them; that each of these negroes paid him twenty-five cents for each prescription. Witness identified 561 prescriptions for whiskey, *544 of them with relator's signature thereto*, which witness testified was the genuine signature of relator. Witness also identified 242 other prescriptions marked "Exhibit No. 2" for *whiskey*, and signed by relator, and that the signature thereto was the genuine signature of relator; that one Ollie Tyson conducted a drug store in Columbia, Missouri, during the month of February and the first part of March, 1910, and this drug store had the reputation of being very bad in reference to the selling of intoxicating liquors.

L. T. Searcy, living at Columbia, Missouri, testified that he was prosecuting attorney and had previously been county clerk of Boone county, and assessor for six years; that the reputation of the Tyson Drug Store for illegal sale of whiskey was bad. He further testified that he was acquainted with the signature of relator, and that the latter wrote 544 of the prescrip-

tions contained in "Exhibit No. 1," which was 561 prescriptions for intoxicating liquors; that these prescriptions were delivered to witness by the proprietor of the Tyson Drug Store when it ceased to operate, and covered a period of February, 1910, and fourteen days in March, 1910. Witness identified the prescriptions contained in "Exhibit No. 2" as having been written by relator and as having his genuine signature thereto, with which he was acquainted, and which exhibit consisted of 242 whiskey prescriptions, 234 of them having been written by relator, and were written between the first of February, 1910, and the 14th of March, 1910, inclusive.

Exhibits 1 and 2 were introduced in evidence. These exhibits are not set out in either abstract of record, and are not before this court.

J. A. Stewart, engaged in the real estate business at Columbia, Missouri, testified that he had been presiding judge of the county court for two terms; that he was acquainted with Dr. Conway, and also his signature; that he had examined the prescriptions contained in exhibits 1 and 2, and that they were signed by relator. He further testified that relator's reputation in reference to professional conduct as a physician was bad.

Dr. Woodson Moss testified that he had been a practicing physician at Columbia since June, 1874, and was on the medical staff of the State University; that he had known relator for about forty years; that they were together at the medical school; graduated at the same time; that relator's general reputation at Columbia, in reference to his general conduct as a physician, was bad.

Dr. J. E. Thornton said he had known relator five or six years; that he was acquainted with his general reputation in the community in reference to his general conduct as a physician, and that it was bad.

E. G. Davis testified that he had lived in Columbia for twenty-six years; was in the livery business, and had known relator about a year; that his place of business was located so he could see the people that visited the office of relator; that the majority of the people visiting relator's office were negroes, and that he had seen quite a number come and go out of his office.

Dr. N. D. Robnett testified that he had lived in Columbia, and was engaged in handling vehicles at his place of business near the Tyson Drug Store. The latter, in his opinion, was purely a whiskey drug store; that it was visited by people who were continuously drinking; that he knew relator, and saw him go in and out of the drug store; *that he visited that drug store several times a day.*

R. M. Wyatt testified that he was constable of Columbia township; that he was acquainted with relator and was in the office of the latter on the 26th of March, 1910; that when he went in relator's office, two men were standing at the counter. Relator was writing a prescription. After they left, two darkies came up and relator wrote one of them a prescription. After he wrote it, he saw witness standing there, and the latter asked relator if the parties were sick that he wrote the prescription for, and he told witness to attend to his own business and he would attend to his. He said relator never asked any questions of the applicants for the prescriptions while he was there, nor did he make any examinations of said applicants.

Jesse M. Whiteside testified that he was deputy constable of Columbia township, and that he was with witness Wyatt on said occasion. His testimony was substantially the same as Wyatt's.

Dr. A. E. Kampschmidt testified that he lived in Columbia, and had been practicing medicine for about

four years; that he had known relator about three years, and was acquainted with his general reputation in that community in reference to his general conduct as a physician, and that it was bad.

John L. Henry testified that he was clerk of the county court and had been since the 1st of January, 1907; that he was acquainted with O. L. Tyson, who was the proprietor of the drug store in Columbia during the months of February and March, 1910; *that Tyson filed with witness a list of the names of the parties for whom he had filled prescriptions for intoxicating liquor.* Witness identified the prescriptions filed with him in the list marked "Exhibit 1" for the first part of the month of March, 1910, there being 242 prescriptions, and covering a period from the 1st of February to the 14th of March; that he did not have the list filed by Tyson for the month of February, 1910, and that the list had been misplaced. *The prescriptions were introduced in evidence and from the prescriptions themselves it appears that relator, from the 1st day of February, 1910, to the 14th of March, 1910 inclusive, issued 778 prescriptions calling for whiskey.*

It appears from the abstract of record, in behalf of the Attorney-General, that before any testimony was introduced before the State Board of Health relator objected to the introduction of any evidence under the charges preferred, for the reason that he was a practitioner of medicine more than five years before the creation of the State Board of Health, which was created in the session of the Legislature of 1883, and which expressly excepted from its provisions any physician or doctor who had been engaged in the practice of medicine and surgery for a period of five years next before the passage of said act, and that the State Board of Health had no jurisdiction over him. It was admitted that relator was a practicing physician at Columbia, Missouri, at the time the

complaint was filed against him, and that he was duly registered as a physician on the 17th of August, 1874.

With the foregoing evidence before it, the State Board of Health annulled and for naught held, for a period of ten years, Dr. Conway's right, permit and license to practice medicine and surgery in the State of Missouri. Thereupon, relator filed in the circuit court of Cole county aforesaid, his petition for a writ of *certiorari*, and in said petition set out the *complaint* of McDonnell and others to the Board heretofore referred to. He likewise stated the history of the proceedings before said board which culminated in the revocation of his license to practice in said State for the period of ten years. He alleged in said petition that said proceedings were without the course of the common law and that no jurisdiction was obtained over him, as he was a duly registered and practicing physician before the statute creating the State Board of Health was ever passed. He averred that he was duly registered in the office of the county clerk of Boone county, prior to September 1, 1874, and that such registration entitled him to practice medicine and surgery in said State, and that by reason thereof he was excepted from the operation of said statutes creating the State Board of Health, and by subsequent amendments thereto or new sections added, and that all the acts, doings and proceedings of respondents as such Board of Health as to relator are void and of no effect. He averred that relator had a natural and constitutional right, as physician and surgeon, to practice medicine and surgery in said State, and the act of the General Assembly of 1909 deprived or attempted to deprive him of such right and privilege, and that the same was unconstitutional and void as to him. He further averred that said Board of Health had exceeded its jurisdiction, and for that reason its acts, doings and proceedings

are void. He averred that there was no evidence upon which to base such finding and judgment of respondents, and their acts were oppressive and void. It was further averred that none of the charges contained any grounds empowering respondents to revoke relator's right, however acquired, to practice medicine and surgery in this State, and that the acts of such board were void. It is averred that the statute under which respondents proceeded to hear, try and determine said charges was unconstitutional and void as to relator. Said petition then concluded with a prayer asking for the issuance of a writ of *certiorari*, directed to respondents in their official capacity as aforesaid, requiring them, and each of them, to *certify* to said court a full and complete copy of the charges and all other acts and proceedings in the trial of relator upon said charges, as well as the evidence, finding and judgment of said board upon said charge against relator, and directing them to return said copy to said circuit court on or before August 1, 1910, etc.

The writ of *certiorari* was in the usual form, and served upon the members of the Board of Health as heretofore suggested.

The motion to quash said writ filed by the Attorney-General recited that relator's petition did not state facts sufficient to constitute a cause of action against respondents. It also charges that the petition filed by relator does not show that respondents have committed any acts which are not authorized by law, or that they have violated the Constitution or laws of Missouri, but such petition shows that respondents have exercised only such powers as they legally were entitled to exercise under the laws of this State. Said motion further charges that relator's petition shows upon its face, that respondents have not been guilty of any abuse or misuse of their rights and powers granted to them by the State of Missouri. The said motion asked the circuit court aforesaid to dismiss re-

lator's petition for a writ of *certiorari*, and to quash the writ formerly issued by the circuit court at relator's cost.

It appears from relator's abstract that on November 26, 1910, upon the issues joined, before Judge Wm. H. Martin, by agreement of counsel, *all the evidence returned by the respondents in obedience to the writ aforesaid, and all proceedings and orders of the Board of Health returned in obedience to the writ of certiorari, were submitted and considered in evidence in the case.*

Then follows a synopsis of the alleged testimony taken before said board. The testimony set out in relator's abstract of record is incomplete and only partially given, as shown by the abstract filed by the Attorney-General. *This evidence, as well as all the proceedings heretofore mentioned, are not called for in the bill of exceptions or made a part of same so far as this record discloses.*

Relator's abstract states that the case was then taken under advisement until the March term, 1911, and that judgment was entered by the circuit court aforesaid in favor of the State Board of Health. The court sustained the action of respondents in relation to the revocation of the license of said Conway to practice medicine and surgery in the State of Missouri. The court likewise dismissed the writ of error formerly issued and quashed and held the same for naught. Said court adjudged that respondents, constituting the State Board of Health, should go hence without day, and recover from said Conway their costs and charges laid out and expended, and that execution issue therefor.

After this judgment was entered, the abstract of record presented by relator discloses that he filed a motion for a new trial, containing some six grounds, which it is not necessary to set out at present. At the conclusion of this motion, said abstract recites

that it was overruled and to the overruling of same he, at the time, duly excepted and saved his exceptions. *This motion for a new trial and the alleged action of the court thereon, are not shown to be a part of the bill of exceptions, nor is there anything in the record tending to show that either are called for in the said bill. The motion for new trial improperly appears as a part of the record proper in the case.*

An affidavit for appeal was filed, and the appeal allowed to this court. Relator's abstract then recites *that within the time allowed by the court, relator presented his bill of exceptions, which was duly signed, sealed, by order of record, filed in this cause and made a part of the record thereof.*

The foregoing contains a full history of all the proceedings in the cause. No distinction is made between the record proper and matters of exception. In fact, there is nothing in the record tending to show that any of the matters heretofore set out are contained in the bill of exceptions, which it is alleged was signed and filed in the cause. On the record thus made, the questions of law will be presented in the opinion which is to follow.

I. The jurisdiction of respondents as members of the State Board of Health is co-extensive with the boundaries of the State, and hence they are classed as State officers. In view of section twelve of article 6 of our Constitution, the case was properly appealed to the Supreme Court. In *State ex rel. v. Higgins*, 144 Mo. l. c. 412, the Court in Banc, referring to above section of our Constitution, said:

“A State officer within the meaning of that section is one whose official duties and functions are co-extensive with the boundaries of the State.”

In *State ex rel. v. Bus*, 135 Mo. l. c. 334, the Court in Banc said:

**Appellate
Jurisdiction.**

“Thus the Constitution gives the Supreme Court appellate jurisdiction in cases where any ‘State officer’ is a party [Sec. 12, art. 6, and amendment adopted in 1883.] This court held that the expression ‘State officer,’ as there used, applied only to such officers as had jurisdiction throughout the State and did not apply to an officer whose jurisdiction was confined to a county, as a sheriff or clerk of a circuit court. [State ex rel. v. Dillon, 90 Mo. 229; State ex rel. v. Spencer, 91 Mo. 206.]”

II. Appellant attacks the validity of section 8317, Revised Statutes 1909, in his brief, for the alleged reason that the General Assembly could not impose upon said State Board of Health the functions which our Constitution devolved upon said Assembly, etc., but in view of the record presented here, we are precluded from reviewing or discussing said constitutional question.

The only thing to be found in appellant's abstract of record, from cover to cover, relating to a bill of exceptions is the following:

“And thereupon the court granted relator leave to prepare and file his bill of exceptions before or during the first day of the July term, 1911, and granted an appeal of this cause to the Supreme Court of the State of Missouri. And within the time allowed by the court, relator presented his bill of exceptions, which was duly signed, sealed, and by order of record, filed in this case and made a part of the record thereof.”

No part of the *alleged* bill of exceptions is set out in the record, nor does it appear that any of the matters contained in said abstract *appear* in the bill of exceptions, or that any of them are *called for* therein. None of the 778 prescriptions calling for whiskey alone, which were signed by relator, filled out and filed between February 1, 1910, and March 14, 1910, have been

set out or preserved in the bill of exceptions, although introduced in evidence by respondents.

The alleged constitutional question *supra* was raised for the first time in the alleged motion for a new trial, which appears as a part of the record *proper* in said abstract. No motion for a new trial is set out or called for in the *bill of exceptions*, and hence there could be no exceptions saved to the action of the court in overruling same. The alleged bill of exceptions does not *contain* or *call for the evidence*, or any of the *records, pleadings or proceedings in said cause*. In short, there is practically no bill of exceptions in the record, and therefore nothing before us for review, but the record proper. [St. Louis v. Young, 248 Mo. 346; St. Louis v. Henning, 235 Mo. l. c. 51; Owens v. Mathews, 226 Mo. 77; Hays v. Foos, 223 Mo. 421; State ex rel. v. Adkins, 221 Mo. l. c. 120; Thompson v. Ruddick, 213 Mo. 561, 564-5; Stark v. Zehnder, 204 Mo. 442; Harding v. Bedoll, 202 Mo. l. c. 630-1; Reno v. Fitz Jarrell, 163 Mo. 411.] There are *many* other cases in the appellate courts of this State to the same effect.

In St. Louis v. Young, 248 Mo. l. c. 347-8, Judge LAMM, in behalf of this division, said:

"The abstract is constructed on a plan steadily condemned by this court as so inherently bad as to be fatally defective, viz., it commingles in an undistinguishable mass matter of exception with record proper and matter contained in record entries, without an earmark to guide us in telling where one begins or the other leaves off. In that fix we cannot know what is in the bill of exceptions. The rule is that since matters of exception must be in the bill of exceptions, the abstract of the bill should show that matters of exception are in the bill. There is only one reference in the abstract to a bill of exceptions and that (at its very close) relates to the filing of one within the leave granted. New rule 31 does not help appellant.

"The judgment below being presumptively correct and finding it responsive to the pleadings, it is affirmed under the authority of many cases. We cite some as samples. From these discern all: *Reno v. Fitz Jarrell*, 163 Mo. l. c. 413; *State v. Baty*, 166 Mo. 561; *Clay v. Publishing Company*, 200 Mo. l. c. 672-3; *Stark v. Zehnder*, 204 Mo. l. c. 448-9; *Gilchrist v. Bryant*, 213 Mo. l. c. 443; *Harding v. Bedoll*, 202 Mo. 625; *Kolokas v. Railroad*, 223 Mo. 455; *Wallace v. Libby*, 231 Mo. 341; *Keaton v. Weber*, 233 Mo. l. c. 694.

"While the point is not raised by counsel yet that is immaterial. This court may raise it *sua sponte*. [*Hutson v. Allen*, 236 Mo. 645.]"

The other cases cited are fully in line with those quoted from, and clearly hold that on the record presented here, we have no alternative, except to determine the case upon the record proper. The alleged constitutional question is not therefore before the court, and cannot be considered by us.

III. With the constitutional question, attempted to be raised by appellant, eliminated from our consideration, it still remains our duty to determine the case upon the record made before the State Board of Health, and certified to the circuit court of Cole county, Missouri.

Review of
Action of
State Board
of Health.

As a general rule the writ of *certiorari* brings up only the record *proper* of the tribunal to which it is addressed, but does not bring up the evidence (*State ex rel. v. Goodrich*, 257 Mo. l. c. 48; *State ex rel. v. Wiethaupt*, 254 Mo. l. c. 329; *State ex rel. v. Casey*, 210 Mo. l. c. 246; *State ex rel. v. St. Louis*, 207 Mo. 354; *State ex rel. v. Wooten*, 139 Mo. App. l. c. 236; *State v. Gilbert*, 164 Mo. App. l. c. 143); but in cases of this character where the State Board of Health has revoked the license of a physician, he may have the

proceedings of said board reviewed under the provisions of section 8317, Revised Statutes 1909. Said section reads as follows:

“If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider depositions and oral statements and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. If a majority of the board are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. Any person whose license has been or shall be revoked by the board shall have the right to have the proceedings of said board revoking his license and all the evidence therein reviewed, on a writ of *certiorari*, by the circuit court of the county in which said board held its session when said license was revoked. Said writ shall issue upon the petition of the person whose license shall have been revoked to said court or to the clerk thereof in vacation at any time within ninety days after such revocation, and shall command the said board and the secretary thereof to certify to said court the record and proceedings of said board, and a complete transcript thereof, and of all the evidence therein pertaining to the revocation of said license. The petitioner for the writ of *certiorari* shall set forth the rights of the petitioner and the injuries complained of by him and shall be verified by him. If the proceedings of the board shall be sustained or upheld by the circuit court, its orders, decisions or judgments revoking said license shall remain and continue in full force and effect. And any such license so revoked by the board shall, pending said review on *certiorari*, stand revoked and so remain until the proceedings of the board relating thereto shall be quashed or otherwise annulled by the circuit

court on said writ of *certiorari*. Testimony may be taken by deposition, to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases.—[Laws 1901, p. 207; amended, Laws 1907, p. 359, Laws 1909, p. 667.]”

The complaint and evidence before said board is set out in our statement of the case. Notice was given appellant; he appeared at the hearing, objected to the jurisdiction of said board over him, took no further part in the proceedings before said board, but filed in the circuit court of Cole county, Missouri, where the hearing was had, a petition for *certiorari*, etc.

Said board certified to the circuit court aforesaid a copy of the complaint, record entries, proceedings and evidence, relating to appellant's hearing before said board, and the case was heard in the circuit court upon the pleadings, record and evidence certified by said board. The decision of the latter was sustained, and the writ of *certiorari* quashed.

Two propositions are presented on the record made before said board: (a), Does the complaint filed before the board state a good cause of action under said section 8317; and (b), Was the evidence adduced at the hearing before said board sufficient to sustain the charges made in the complaint, and to warrant said board in revoking appellant's license to practice medicine in Missouri for ten years?

The evidence is clear and convincing that appellant, in the town of Columbia, county of Boone and State of Missouri, did fill out, sign as a physician, and deliver to various persons in said town, during February, 1910, and up to the 15th of March in said year, 778 prescriptions for whiskey, without any other ingredients being called for therein, to be used as a beverage, and for which he received twenty-five cents

for each alleged prescription so made out and signed; that all of these prescriptions were filled at the drug store mentioned in evidence and presumably the whiskey was furnished as called for in each prescription. In other words, the complaint alleges, and the evidence shows, that appellant, in a local option town and county, was engaged in the wholesale business of filling out *blank* prescriptions for whiskey alone, to be used as a beverage, by inserting in said blank prescription, the name of purchaser and signing his own name thereto, as a physician, and for which he charged and received twenty-five cents for each of said prescriptions.

The complaint and evidence show that he sold largely to negroes, and that his general reputation in regard to such matters was bad. He was present at the hearing before the board and failed to testify or to meet in any manner the damaging testimony produced there by complainants. He was engaged in this disreputable business at a great seat of learning, where hundreds of students are attending school, and yet does not offer any excuse in the record here for prostituting his office as physician, and bringing disgrace upon the profession to which he belonged.

Section 8317 *supra* provides that:

"The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and *they may revoke licenses, or other rights to practice, however derived,* for like causes, and in cases where the license had been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section, but these specifications are

not intended to exclude all other acts for which licenses may be revoked."

It needs no citation of authorities to demonstrate that appellant's conduct aforesaid, as disclosed by the undisputed facts in the record, was both unprofessional and dishonorable. In addition to the foregoing, every prescription of above character which appellant signed as physician and delivered, and upon which whiskey was obtained as a beverage, constituted a crime against this State.

Section 5784, Revised Statutes 1909, reads as follows:

"Any physician, or pretended physician, who shall make or issue any prescription to any person for intoxicating liquors in any quantity, or for any compound of which such liquors shall form a part, to be used otherwise than for medicinal purposes, or who shall issue more than one prescription at the same time to any one, for intoxicating liquors, or for any compound of which such liquors shall become a part, or who shall make or issue any prescription contrary to any existing law, shall be deemed guilty of a misdemeanor, and upon conviction be punished by a fine of not less than forty nor more than two hundred dollars."

While appellant might have been successfully prosecuted under the statute last quoted, it does not militate in the least against the right of the State Board of Health, under the circumstances detailed in this record to revoke his license.

The record of said board is free from error, and the revocation of appellant's license to practice medicine and surgery in Missouri for ten years was fully justified by the record in this cause. The judgment of the circuit court, sustaining the action of said board, is accordingly affirmed. *Brown, C.*, concurs in result.

PER CURIAM.—This cause coming into Banc from Division No. One, the opinion of RAILEY, C., is adopted as the opinion of the court. *Woodson, C. J.*, and *Graves, J.*, concur; *Bond, Blair and Revelle, JJ.*, concur in result only, and *Faris and Walker, JJ.*, dissent.

C. W. BARNES, Appellant, v. CITY OF KIRKS-
VILLE.

In Banc, December 8, 1915.

1. **CONSTITUTIONAL LAW: Title: Four Councilmen in Title: Two in Body of Act.** The title of an act authorizing a city of the third class to elect a mayor and four councilmen at large, the body of which provides for the election of four councilmen as a maximum, but permits the election of three or even two according to the population of cities adopting the act, is not violative of the Constitution, since the title is a fair forecast of the contents of the bill and its subject.
2. ———: ———: **Population.** Nor does the body of the act use words of present meaning when referring to the population which shall entitle certain cities to organize thereunder, but a simple inspection of its language demonstrates that it only means the future population which those cities must have that are to elect two or three or four councilmen according to the apportionment made by the act.
3. ———: **Commission Form of Government: Special Law.** The Act of 1913, authorizing cities of the third class, after having adopted it, to elect a mayor and two, three or four councilmen at large, is not a special or local law. Both in its title and body, its words of classification according to population are applicable to all cities which now do or in the future may fall within these specifications.
4. ———: ———: **Fifth Class of Cities.** The said act does not alter the preexisting classification of a city adopting it as one of the third class, but leaves it, and all other cities which may adopt its provisions, in the same class in which they belonged prior to its enactment. It merely gives to them, for purposes of administration, similar governmental powers and functions, and expressly provides that all these new methods

Barnes v. Kirksville.

of administration may be surrendered and those which such cities formerly had may be resumed, at any time, at the option of the voters. It does not create a fifth class of cities.

5. **COMMISSION FORM OF GOVERNMENT: Not Sovereignties.** Municipalities which have adopted the statute providing for commission form of government and are governed by commissioners are in no sense sovereignties, and do not fall within the constitutional provisions apportioning the powers of sovereign States.

Appeal from Adair Circuit Court.—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

A. Doneghy for appellant.

(1) The constitutional provisions contravened by the act are as follows: "No bill . . . shall contain more than one subject, which shall be clearly expressed in the title"—Art. 4, sec. 28; "The General Assembly shall not pass any local or special law."—Sec. 53, art. 4; "The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions."—Sec. 7, art. 9. (2) The title of the act tells the members of the legislative body that it is an act which is to apply to all cities of the third class, and that it provides for the election of four councilmen at large in all such cities. The body of the act provides for two councilmen in cities of a certain population, three in another and four in certain others. *Expressio unius*, etc. And, in the body of the act (Sec. 2, p. 518), when it comes to provide for the number of councilmen, it reads: "Cities having a population of three thousand and less than twelve thousand shall proceed to the elec-

tion of a mayor and two councilmen;" twelve and less than twenty, mayor and three councilmen; and in cities having a population of twenty thousand and not more than thirty thousand, shall proceed to the election of a mayor and four councilmen. This section, and other sections, do not provide for cities that now have or may hereafter have a population of more than twenty and not more than thirty thousand population. This court judicially knows that, at the time of the passage of the act, the cities of Springfield and Joplin were each cities of the third class and each contained more than thirty thousand population, and therefore the act could not operate on them and they could not, under it, elect four councilmen at large; and this court also knows that there are now no cities in this State of more than twenty and not more than thirty thousand, so that the act itself does not provide for four councilmen in any existing city that can come under its influence. The title is therefore subject to the criticism that it does not clearly express the subject, and, more, it is misleading. *Cooley, Con. Lim.* (5 Ed.), p. 172. (3) It is a local or special law in that it can not operate alike on all cities that adopt it. Cities of different population will be subject to different laws and restrictions. Note, Secs. 2, 4, 5, 6, 7, 8, 9, 14, 16. *Murname v. St. Louis*, 123 Mo. 470; *Henderson v. Koenig*, 168 Mo. 356. (4) It violates section seven of article nine of the Constitution in that it divides cities of the third class into different classes and thereby creates or attempts to create a prohibited class. Section one clearly indicates its purpose to be that cities that adopt it shall no longer belong to the constitutional class to which the Legislature had placed them, but "may become organized under the provisions of this act." And section 22 provides how a city that has once adopted it can throw aside its new uniform and regulations and go back and again drill in the class to which it formerly belonged or to which it may then be

entitled to go into on account of population. The following sections of the act could only apply to cities of the third class having a population of less than thirty thousand; section two makes provisions for a mayor and four councilmen in cities having more than twenty and less than thirty thousand, and no provisions which can apply to cities of the third class which have thirty thousand or more. Section five provides different election machinery according to population. Section six provides for a different law-making body according to population; section nine provides a different scale of salaries and a different mode of prescribing the salary according to population; section fourteen, in regard to civil service rules, is subject to the same criticism; section sixteen prescribes different rules as to financial statements. That the act creates, or attempts to create a forbidden class of cities, is more readily seen when we come to apply it to a city of the fourth class, for when such a city organizes under the act it ceases to operate under any of the laws of a city of the fourth class, but is, from that time forward, without ever having in the manner prescribed by statute, elected to become a city of the third class, made subject to all laws applicable to cities of the third class, not repugnant to the act, and no longer subject to the statute in regard to fourth class cities. Under the provisions of the act in question it is impossible for all cities adopting it to be governed by the same laws and be subject to the same restrictions. *State ex rel. v. Borden*, 164 Mo. 221; *St. Louis v. Dorr*, 145 Mo. 466; *Owen v. Baer*, 154 Mo. 434; *Hall v. Sedalia*, 232 Mo. 344.

Weatherby & Frank for respondent.

(1) The courts before pronouncing a statute unconstitutional, should be satisfied beyond a reasonable doubt of its vice, all presumptions being in favor of its

constitutionality. *Bank v. Clark*, 252 Mo. 20; *State v. Buente*, 256 Mo. 227; *Bledsoe v. Stallard*, 250 Mo. 154; *State ex rel. v. Kirby*, 168 S. W. 746; *Kansas City v. Land Co.*, 169 S. W. 62. (2) The act of the Forty-seventh General Assembly does not violate section 28 of article 4 of the Constitution which provides, "No bill . . . shall contain more than one subject, which shall be clearly expressed in the title." *State ex rel. v. Miller*, 100 Mo. 439; *Lynch v. Murphy*, 119 Mo. 163; *State ex rel. v. County Court*, 128 Mo. 441; *State ex rel. v. Vandiver*, 222 Mo. 221; *O'Brien v. Ash*, 169 Mo. 299; *Ex parte Loving*, 178 Mo. 194. (3) The act in question does not violate section 53 of article 4 of the Constitution which provides, "The General Assembly shall not pass any local or special law." *State ex rel. v. Pond*, 93 Mo. 606; *Ex parte Swan*, 96 Mo. 44; *State v. Moore*, 107 Mo. 78; *Cole v. Dorr*, 22 L. R. A. (N. S.) 534; *State ex rel. v. Mankato*, 41 L. R. A. (N. S.) 111; *State ex rel. v. Clayton*, 226 Mo. 292. (4) The act in question does not violate section 7 of article 9 of the Constitution which provides, "The General Assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four and the power of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same laws." *Laws 1913*, sec. 1, p. 517; *State ex rel. v. Clayton*, 226 Mo. 292. (5) All cities and towns in the State, containing 3,000 and less than 30,000 inhabitants which shall elect to be a city of the third class, shall be cities of the third class. *R. S. 1909*, secs. 8526, 8529. (6) Any third class city in the State of Missouri, or any city acting under a special charter, although they may have a population of more than 30,000 inhabitants, nevertheless remain third class cities until they elect otherwise.

BOND, J.—This is a suit for salary alleged to be due plaintiff as marshal of the city of Kirksville. The defendant, the city of Kirksville, answered that on the 10th of March, 1914, at an election duly held, it adopted the provisions of the act of the General Assembly (Laws 1913, p. 517) permitting cities of the third class and others to organize thereunder and to exercise the powers of government therein specified; that it became duly organized and officered as provided in said act and vested with all the powers and privileges granted thereby; that in the exercise of such powers and duties its mayor and councilmen passed a resolution on April 13, 1914, terminating the office of plaintiff as marshal of said city and elected another in his place who has since discharged the duties of the office.

Plaintiff replied that said act providing for such organization was void under section 53, article 4, of the Constitution in that it was a local or special law, and also under section 7, article 9, of the Constitution in that it provided for more than four classes of cities.

Upon the issues joined the cause was submitted to the court upon the following agreed statement of facts:

“For the purpose of dispensing with the introduction of evidence in the trial of the above cause, it is agreed, subject to the objection of either party hereto for incompetency, that the plaintiff was on the — day of April, 1913, duly elected and commissioned to the office of marshal for a term of two years and entered upon the discharge of the duties of said office and discharged the duties thereof until the 13th day of April, 1914; that on the — day of June, 1892, said city of Kirksville was organized as a city of the third class, and divided into four wards; that said city has refused to pay plaintiff the salary of the marshal's office ever since the 13th day of April, 1914; that ordinance No. 1862 was passed by the council and ap-

proved by the mayor prior to the election and commission of plaintiff and was at said time in full force and effect, and provided a salary of fifty dollars per month; that on the 10th day of March, 1914, pursuant to a petition of the electors of said city of Kirksville equal in number to more than twenty-five per centum of the votes cast for all candidates for mayor at the last preceding city election of said city prior to the filing of said petition, and pursuant to a proclamation calling aforesaid special election, a special election was duly had and held on said 10th day of March, 1914, at which special election the terms and provisions of an act of the Forty-seventh General Assembly of the State of Missouri, entitled, 'An act providing for an alternative form of government for cities of the third class and cities now having or that may hereafter have a population entitling them to become cities of the third class, and certain cities under special charters, making provisions for the election of a mayor and four councilmen at large, for a method of nominating candidates for office at a primary election, for electing candidates selected at such primary election at a general election, providing for the appointment of various city officers, and providing for the initiative and referendum in municipal legislation, and further providing for the recall of any elective officer, which shall become effective only in the event of an adoption of the provisions of this act by the vote of the electors of any of said cities, and providing for the renunciation of the provisions of this act when once adopted, with an emergency clause,' approved March 28, 1913, and found in the Laws of Missouri of 1913, at pages 517 to 533 both inclusive, was by said city of Kirksville duly adopted and said city organized under the provisions of said act; that return of said election was duly made; thereafter on the 7th day of April, 1914, at a general election duly had and held in said city one

Charles E. Still was elected mayor of said city and Thomas Rainey and Rapheal M. Miller were elected councilmen at large of said city; that return of said election was duly made and thereupon said last-named mayor and councilmen at large of said city took the oath of office and were commissioned as such officers and entered upon the discharge of the duties of their respective offices; and at all times since they have been the only persons holding or claiming to hold the office of mayor and councilmen in said city and at all said times have discharged the duties of said offices; that on the 13th day of April, 1914, aforesaid mayor and council of said city, by a resolution, entitled, 'A resolution terminating the term of office of certain city officials in the city of Kirksville, Missouri,' passed and adopted on the 13th day of April, 1914, and signed and approved by the mayor on said date, declared by aforesaid resolution that the term of office of plaintiff as marshal of said city of Kirksville ceased and determined on said 13th day of April, 1914; thereafter and on said 13th day of April, 1914, the mayor and council aforesaid by unanimous vote of said mayor and council elected one George M. Malone to the office of city marshal; that said George M. Malone took the oath of office prescribed by statute and was duly commissioned as marshal of said city by the mayor of said city and did duly file a bond as required by statute, which said bond was by the mayor of said city approved, and said George M. Malone ever since said last-named date has performed all the duties of the office of marshal of said city and has received the salary provided by ordinance therefor."

The trial court found the issues for defendant and against the plaintiff, from which the plaintiff has appealed to this court.

I.

The plaintiff (appellant) does not assail in this action the existence of defendant as a municipal corporation of the third class, since that status is conceded both by the pleadings and the agreed statement of facts. What the appellant seeks to recover by this suit, is the compensation which would be due him as marshal of the city of Kirksville under its incorporation as a city of the third class according to the terms of an ordinance duly enacted by it.

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To this demand the only defense is that appellant was legally removed from the office of marshal on April 13, 1914, by the mayor and council of said city in pursuance of the powers vested in them by the terms of the act of the Legislature providing for the assumption of other governmental powers after an organization as prescribed by the act. [Laws 1913, pp. 517 et seq.]

This narrows the controversy to a single inquiry, for it is agreed that respondent complied with the conditions attached in the act to the grant of powers therein specified and thereafter duly removed the appellant from the office of marshal and elected another, hence, the only question left is the constitutional validity of the act empowering respondent to terminate appellant's term of office. [Laws 1913, p. 524, sec. 10.]

Before passing on the objections of appellant to this enabling act, it is well to note that none of the objections involved a disincorporation of defendant as a municipal body, nor its right to exist as a city of the third class, and hence we are not precluded from considering such objections by the rule that the corporate existence of a municipal corporation can only be attacked by the State through its proper officers. [State ex inf. v. Fleming, 147 Mo. l. c. 12; Kansas City v.

Stegmiller, 151 Mo. 189; Burnham v. Rogers, 167 Mo. 17; Bradley v. Reppell, 133 Mo. 545; State ex rel. v. Mineral Land Co., 84 Mo. App. l. c. 39.]

II.

The first objection to the validity of the act under review is that the title is not adequately descriptive of the body of the act.

The title is quoted *in extenso* in a former paragraph. It provided for the election of a mayor and four councilmen, and provides also for the adoption of its provisions by cities "now having or that may hereafter have a population entitling them to become cities of the third class." It is contended that the first of these provisions does not describe the contents of the bill, since although the body of the bill provides for the election of four councilmen as a maximum, yet it also permits three or even two councilmen to be elected according to the population of the cities adopting the act when the election shall be held. There is no merit whatever in this objection. The title expresses the full limit of the councilmen to be elected by the cities having the largest population within the prescribed limits at the time the election is held. Such a definition of the purpose of the bill fairly and reasonably embraces a provision therein for a less number of councilmen according as the population of the city, desirous of embracing the provisions of the bill, shall be less than that required for the election of the full number of councilmen mentioned in the title. If the title points to the election of *four* councilmen no one could be misled as to the provisions of a bill which provided not only for *four* but for a lesser number of councilmen.

Neither is there any force in the further contention that the body of the bill (section 2) uses words of present meaning when referring to the population

which shall entitle certain cities to organize thereunder. A simple inspection of the language of this section discloses that it can only mean the future population which those cities shall have who are to elect two or three or four councilmen as may happen under the apportionment made by the bill. The words of this section, necessarily and of their own force, carry a future sense and meaning and are intended to be applicable to the subsequent time when cities on account of their growth in population shall be entitled to hold the elections provided for in the bill, and this conclusion is further demonstrated by the fact that the language of the title in referring to the holding of such elections is expressly put in the future tense.

Our conclusion is that the foregoing objection as to the title of this bill, if not trivial, is destitute of any logical or legal force, and that neither the letter nor the spirit of the Constitution (art. 4, sec. 28) was violated when this act was passed.

In the exposition of that constitutional provision it has been uniformly ruled that it only requires that the *title* shall be a "fair forecast of the contents of the bill" and its subject, so as not to mislead the law-makers or the people. And where the subsequent provisions of the bill are within the radius of that subject, it does not violate the Constitution. [State ex rel. v. Revelle, 257 Mo. l. c. 538, and cases cited; Burge v. Railroad, 244 Mo. l. c. 91.]

III.

The other objections are that the act under review is local and special, and that it creates a fifth class, whereas the Constitution only provides for a division of the cities of the State into four classes. [Constitution, art. 9, sec. 7; Calland v. Springfield, 264 Mo. l. c. 301.]

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Law.**

We are unable to perceive any force in either of these contentions. A glance at the terms of the act

shows that its words of classification according to population, both in the title and in the body of the bill, are applicable to *any* and *all* cities which shall or may in the *future* fall within these specifications. In such cases the rule is too well settled for cavil both here and elsewhere that the act is not obnoxious to the constitutional prohibition against certain special laws. [State ex rel. v. Southern, manuscript opinion; State ex rel. v. Clayton, 226 Mo. 292; State ex rel. Hunt v. Tausick, 35 L. R. A. (N. S.) 802; State ex rel. Simpson v. Mankato, 41 L. R. A. (N. S.) 111; Munn v. Finger, 51 L. R. A. (N. S.) 631; Walker v. Spokane, 24 Am. & Eng. Ann. Cases, 994; Mayor v. State, 35 Am. & Eng. Ann. Cases, 1213.]

As to the objection that the act creates a fifth class of cities, the answer is, that the bill does not alter the preexisting classification of the city of Kirksville as one of the third class, but leaves it, and all other cities which shall adopt its provisions, in the same class to which they theretofore belonged. It merely gives to them for purposes of administration, similar governmental powers and functions, and expressly provides that all these new methods of administration may be surrendered and those which such cities formerly had may be resumed at any time at the option of the voters.

Indeed all these contentions as to constitutionality made by appellant in the present case were ruled adversely when the same points were made against the act of the General Assembly whereunder the city of St. Joseph was permitted to organize as a city of the first class. In that case a mandamus to compel the city to proceed under its former charter as a city of the second class was sought on the theory that the new act (approved January 14, 1909) was unconstitutional in the several respects which are now urged against the bill under review. But the court held after a clear and

careful analysis of the grounds of attack in that case, which were similar to those relied upon in this case, that there was no merit in any of the contentions and denied the writ of mandamus. [State ex rel. v. Clayton, 226 Mo. 292.]

IV.

The cases cited above from other jurisdictions and the terms of the act under review and those of a similar act passed in 1913 and applicable to cities of the second class (Laws 1913, p. 453, sec. 49) demonstrate that the State of Missouri is only following the trend of those measures of reform previously enacted in the leading States of the middle west and in other portions of the country for the eradication of inefficiency in the working of their governmental agencies. The object of this and similar legislation is to give the cities of the State an opportunity to adopt what is termed the commission form of government, the chief excellence of which is the concentration of municipal power into the hands of a few men or responsible agents who are usually put at the head of the several departments necessary to the conduct of the business of cities. The general plan was early put into operation at Galveston, Texas (after the storm of 1900), and has spread over the country with remarkable rapidity. Up to the present time the agents have not exceeded five and are termed commissioners. They are selected by means of a short ballot and are usually subject to a recall. The union in their hands of quasi-judicial as well as administrative authority does not violate the constitutions of the various States, since it has been uniformly held that the municipalities so governed are not in any sense sovereignties and hence do not fall within the provisions of the constitutions which apportion the powers of sovereign States. The

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salutary measures enacted by the Legislature of this State on this subject reflect credit on that body and must result in the protection of urban life and the promotion of civic betterment.

The act under review was devised and in our opinion will contribute to these ends and was enacted under full constitutional warrant. The learned trial court reached that conclusion and the judgment is affirmed. All concur except *Woodson, C. J.*, who dissents.

GEORGE W. TAYLOR v. ST. LOUIS NATIONAL
LIFE INSURANCE COMPANY, Appellant.

Division One, December 21, 1915.

1. **INSURANCE COMPANY: Organization: Agent to Sell Stock.** Under the statutes (Secs. 6895-6902, R. S. 1909) a charter of an insurance company cannot be adopted until its stock is subscribed, nor is there any corporation until the amount of the proposed stock has been subscribed. The persons designated as "corporators" in those statutes are only given power to open and keep open books to take subscriptions to the capital stock; they have no stock for sale, and are not authorized to sell stock upon the market or otherwise; nor do they have power, in behalf of the corporation, to enter into a contract with an agent to sell stock or proposed stock.
2. ———: ———: ———: **Purpose of Statute.** The statutes mean that the cash paid or secured notes given for the stock of an insurance company, at the time of its organization, shall go into its corporate treasury, and shall not be depleted or diminished by percentages paid to an agent of the corporators for securing subscribers. And they apply in the same way to any surplus obtained from subscribers of the stock.
3. ———: **Contract with Agent Prior to Organization.** A contract made with the chairman of the "corporators" or organization committee of an insurance company, to pay an agent a certain commission on all subscriptions he obtains to the company's corporate stock, having been made before its organization, is not binding on the company, or enforceable against it.

4. ———: ———: Notice of Limited Powers. The "corporators" of an insurance company prior to its organization, are, under the statutes, agents of limited powers, and any one dealing with them must do so at his peril; and an agent, who enters into a contract with the chairman of the organization committee, who afterwards becomes its president, to obtain subscribers to its proposed capital stock, for a certain commission, is chargeable with notice that such chairman had no power to bind the corporation by such contract, for he is also chargeable with notice that under the statutes there can be no corporation until after the stock is subscribed, and that all the cash received from subscribers to stock must go into the company's treasury.
5. AGENT: Failure to Sell Stock at Agreed Price. Where plaintiff agreed to sell stock at \$200 for each share of \$100 par value, and for his services was to receive ten per cent of the amount he so sold, he cannot, in a suit on the contract, and not in *quantum meruit*, recover for stock sold at less than \$200 a share. And an agreement by a trust company to put up, for incorporation purposes merely, an amount of money equal to \$200 per share of the stock sold to it, with the understanding that one-half of it is to be returned to it after the company is duly incorporated, cannot be twisted into a sale at \$200 per share.
6. ———: Action on Specific Contract: Quantum Meruit. Where plaintiff's pleadings are bottomed on a specific contract and the case is tried on that theory, a judgment cannot stand on *quantum meruit*.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

REVERSED.

Collins, Barker & Britton, E. M. Harber and Albert L. Reeves for appellant.

(1) Defendant's demurrer to the evidence at the close of plaintiff's case should have been sustained. (a) There was no evidence of Starnes's authority to bind the defendant. A principal is responsible for the act of an agent acting with apparent authority, only where the principal has clothed the agent with the appearance of power. *Taylor v. Sartorius*, 130 Mo. App. 34; *Duffy v. Mallinkrodt*, 81 Mo. App. 449. Starnes could not have bound the defendant by wrong-

fully assuming to act as its president. Art. 2, chap. 61, R. S. 1909. (b) There was no evidence of Webb's authority to act as agent for the Missouri-Lincoln Trust Company in the purchase of the stock. Taylor v. Sartorius, 130 Mo. App. 24; Lyons v. Corder, 253 Mo. 551. (c) There was no sale at \$200 per share, in compliance with the terms of plaintiff's alleged contract with Starnes. Young v. Cooperage Works, 259 Mo. 220. (d) Plaintiff was not the procuring cause of the sale actually made. (2) Defendant's peremptory instruction as the close of the whole case likewise should have been sustained. (3) While the appellate court will not disturb the verdict of the jury upon a question of the weight of evidence, it will not hesitate to do so where the verdict is not supported by the evidence. Lyons v. Corder, 253 Mo. 561; Graney v. Railroad, 157 Mo. 678; Powell v. Railroad, 76 Mo. 84; McFarland v. Accident Assn., 124 Mo. 222; O'Donnell v. Railroad, 152 Mo. App. 614; Fitzjohn v. Transit Co., 183 Mo. 78; Knisely v. Leathe, 178 S. W. 461; College v. Dockery, 241 Mo. 522. (4) The judgment of the lower court should be reversed without remanding. Knisely v. Leathe, 178 S. W. 461; College v. Dockery, 241 Mo. 522.

Marion C. Early for respondent.

(1) The petition alleged that defendant was a corporation duly organized, and this allegation not being denied under oath, it is admitted. Under the pleadings and the evidence it was a corporation *de jure* at all times from and after the date of plaintiff's contract. (2) The defendant held itself out as a corporation; it allowed Starnes to advertise himself as its president; it allowed him to act for it in the sale of a portion of its stock; it accepted the results of the contracts made by him and under the facts disclosed it is, as to third persons dealing with it in good faith, a corporation *de facto* in any event and it is liable to third

persons for its acts. *Camp v. Byrne*, 41 Mo. 525; *Knapp v. Joy*, 9 Mo. App. 575; *Brown v. Scottish American Mortg. Co.*, 110 Ill. 235; *Montgomery v. Hurst*, 9 Ala. 513; *Douglas County v. Bolles*, 94 U. S. 104; *Bank v. Trust Co.*, 187 Mo. 494; *Wescott v. Guarantee Ins. Co.*, 63 Mo. App. 366; *Famous Ins. Co. v. Medles*, 52 Mo. 17; *National Ins. Co. v. Bowman*, 60 Mo. 252; *Ragan v. McElroy*, 98 Mo. 349; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101. (3) It is well settled that when an officer of a corporation is allowed to exercise a particular authority publicly, in other words, if he is in effect held out to the world as having authority in the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted, in which case it is not necessary in order to charge the corporation to prove special authorization. *Fayles v. Ins. Co.*, 49 Mo. 380; *Slothard v. Aull*, 7 Mo. 318; *Lungstrass v. Ins. Co.*, 57 Mo. 107; *Ceeder v. Lumber Co.*, 86 Mich. 541; *Ferry Co. v. Sidell*, 66 Fed. 27, 13 C. C. A. 308; *Thompson on Corp.*, secs. 4876-4882; *Chenoweth v. Express Co.*, 93 Mo. App. 199; *Moon v. Mfg. Co.*, 113 Mo. 98; *Rosenbaum v. Gilliam*, 101 Mo. App. 126; *Tyler Estate v. Hoffman*, 146 Mo. App. 522. (4) Even if Starnes had no authority to enter into a contract with plaintiff the defendant is estopped to deny its liability because it acquiesced in Starnes's act by accepting and retaining the fruits thereof. *Ferguson v. Trans. Co.*, 79 Mo. App. 352; *Glass v. Brewing Co.*, 47 Mo. App. 641; *Drug Co. v. Robinson*, 81 Mo. 26; *Railroad v. Vamedoe*, 81 Ga. 175. (5) The defendant recognized the authority of Starnes to bind it by the contract with plaintiff by part payment to plaintiff for services rendered under the contract. The evidence shows defendant's contract to pay plaintiff a stated sum was the usual amount it was paying for such services. *Fayles v. Insurance Co.*, 49 Mo. 380; *Stohard v. Aull*, 7 Mo.

318; Bank v. Bank, 107 Mo. 145. (6) The fact that defendant on its own motion may have made a contract whereby in the end it may have received a less consideration than it authorized plaintiff to offer, does not deprive plaintiff of his right to a commission on the amount realized. If in the opinion of the court the verdict is excessive the court is empowered to order a *remittitur*. Nichols v. Whitacre, 112 Mo. App. 692; Grether v. McCommack, 79 Mo. App. 325; Glade v. Mining Co., 129 Mo. App. 455; Smith v. Salt Co., 177 S. W. 1057.

GRAVES, P. J.—This is an action to recover commission for the sale of stock of the Universal Insurance Company, later by authorized change of name the present defendant, St. Louis National Life Insurance Company. Plaintiff sues upon an express contract to sell such stock at \$200 per share of \$100 par value, and to receive for such service the sum of ten per cent of the amount of stock so sold. He then avers he was the procuring cause of the said defendant having sold \$75,000, in par value, or 750 shares, at the price and sum of \$200 per share, and asks judgment for \$15,000 and interest, less a payment of \$200 which he avers to have been made.

The action is one clearly upon contract and not upon *quantum meruit*.

By the petition it would seem that there had been a settlement with plaintiff for \$200, but this he avers to have been procured and induced by fraudulent statements, and it is for this \$200 that he gives credit on the claimed commission of \$15,000.

The answer was a general denial. From a verdict and judgment of \$19,405.50, the defendant has appealed. Further facts will be stated in the course of the opinion under the points involved.

I. The first point urged by the defendant, is that the plaintiff had no valid contract with the defendant, and in as much as his own proof shows such fact, the demurrer to the testimony interposed by the defendant should have been sustained.

Organization of Insurance Company:
Contract with Agent.

It is clear from all the evidence in this case that the organization of the Universal Life Insurance Company was not completed at the time plaintiff says that he contracted with it through P. M. Starnes. It could not have been completed until after the stock had been fully subscribed. It was not fully subscribed at the time of plaintiff's alleged employment. He testifies that he was introduced to P. M. Starnes as the president of the company, and that the sign at the office door was, "Universal Life Insurance Company; P. M. Starnes, President." In this discussion we are granting it to be true that P. M. Starnes actually made the contract with plaintiff, as such contract is pleaded in his petition. Under all the evidence it was made with Starnes, or not at all. Defendant's testimony is to the effect that Starnes, prior to the subscription for all the stock, was merely a member of the organizing committee. The evidence is undisputed that at the time of the alleged employment of plaintiff to get subscribers to stock, only one-half of the proposed capital stock of the corporation had been subscribed. The proposed capital stock was 1500 shares of the par value of \$100 each, but subscribers were taken on the basis of \$200 per share, so as to create a surplus equal to the capital stock. Plaintiff's claim is that he induced the Missouri-Lincoln Trust Company and Mr. Webb to take the last half of the 1500 shares, or 750 shares at \$200 each. This is the basis of his action. It shows upon its face that the insurance company was not then organized, because it could not have been organized. It shows upon its face that Starnes was not president,

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because he could not have been president at that time, i. e., prior to the completed organization. The records are plain in this case, and even the way-farer cannot go far astray. On July 10, 1907, the following records appear:

11:30 a. m. July 10, 1907.

The committee met in full at 11:30 a. m. Messrs. Blanke, Rassfeld, Goerts and James present, and called to order by Chairman Blanke.

Proposition was presented by Rassfeld and read by him from Barten in Litchfield, Ill., for completion of organization. On motion by Rassfeld and seconded by Blanke, this proposition was rejected.

Proposition submitted by the Mississippi Valley Life Ins. organization committee was on motion tabled for future consideration.

Proposition from P. M. Starnes not being completed, on motion committee adjourned to meet at 5:30 p. m. July 10, 1907.

OTTO H. RASSFELD, SECT.

5:30 p. m. July 10, 1907.

Committee meeting called to order, Messrs. Blanke, Rassfeld, James and Goerts being present, by Chairman Blanke.

Proposition of P. M. Starnes submitted and read by Rassfeld. After careful and thorough consideration and investigation, on motion by Rassfeld, seconded by James, the committee voted to accept same.

On motion of James, seconded by Blanke, P. M. Starnes was elected a member of the committee, and chosen as chairman.

On motion, committee adjourned to meet at call.

OTTO H. RASSFELD, SECT.

These entries show that Starnes first became connected with the organization committee, not the corporation, on July 10, 1907.

On July 20th, after the stock deal with the Missouri-Lincoln Trust Company, the "first meeting of incorporators of the Universal Life Insurance Company" was had. At this meeting the first board of directors was selected, and the organization committee was directed to report expenses of the organization.

On the same day Mr. Lewis was made chairman of the board of directors, and P. M. Starnes, president of the company, and J. A. Webb, secretary and treasurer of the company. It therefore stands out in bold faced type that Starnes was not and could not have been president of the defendant at the time of the alleged contract with plaintiff.

At most he was, in fact, but the chairman of the organization committee. Now on these facts we must apply the law.

That the organization of the Universal Life Insurance Company (the first name of the defendant, and it might not be amiss to say that it is now the Pioneer Life Insurance Company of Kansas City) was not completed at the date of the alleged contract with plaintiff, is made clear by the statute. Defendant was to be organized as a joint stock company, under and by authority of what is now article 2, chapter 61, Revised Statutes 1909.

Section 6898 of this article reads: "The persons mentioned in section 6895 shall be designated as corporators, and such corporators, desiring to form a company for the purpose of transacting the business mentioned in said section 6895, or any part of the same, shall file in the office of the superintendent of the insurance department a declaration signed by each of said corporators, setting forth the place of residence of each of them, and their intention to form a corporation for the purpose of transacting the business aforesaid, which declaration shall comprise a copy of the charter proposed to be adopted by them; and they shall publish once in each week, or oftener, for at least four weeks, in a newspaper of general circulation, published in the county where such corporation is proposed to be located, a notice of the filing of such declaration, together with a copy of the same."

Note the language as to the charter. This section simply says that this preliminary declaration shall contain "a copy of the charter *proposed to be adopted* by them." Then follows section 6899, which provides what this *proposed*, not adopted, charter shall contain.

Following this is section 6900, some parts of which we have italicized: "Whenever the corporators shall have filed the declaration required by section 6898, and also proof of the publication therein required, by the affidavit of the publisher of the newspaper in which the publication was made, his foreman or clerk, with the superintendent of the insurance department, it shall be the duty of said superintendent to submit such declaration to the Attorney-General of this State for examination, and if it shall be found by him to be in accordance with the provisions of this article, and not inconsistent with the Constitution and laws of this State and the United States, he shall so certify and deliver it back to the superintendent, who shall cause the said declaration and affidavit, with the certificate of the Attorney-General, to be recorded in a book kept for that purpose, and shall furnish a certified copy of the same to the corporators, and shall also file a certified copy of the same with the Secretary of State, who, upon payment into the State Treasury of the tax required by section 2976, shall issue a certificate of incorporation, upon the receipt of which they shall be a body politic and corporate, *and may proceed to organize in the manner set forth in their charter, and to open books for subscription to the capital stock of the company, and keep the same open until the whole amount specified in the charter is subscribed, but it shall not be lawful for such company to issue policies or transact any business of any kind or nature whatsoever, except as aforesaid, until they have fully complied with the requirements of this article.*"

It must be seen that in the formative period the powers of the "corporators" are extremely limited.

Their only power is to open books for subscription to the capital stock, and keep them open until the proposed charter amount has been subscribed. Then we have sections 6901 and 6902, which read:

“Sec. 6901. Upon being notified that the capital stock named in the charter has been subscribed, and one hundred thousand dollars thereof paid in, the superintendent shall make an examination, or cause to be made by some disinterested person specially appointed by him for that purpose, and if it shall be found by himself, or if the person so appointed shall certify, under oath, that the provisions of section 6920 have been complied with by said company, as far as applicable thereto, which certificate, when made, shall set forth the particulars of such compliance, then the superintendent shall so certify, and the corporators or officers of such company shall be required to certify, under oath, to the person making such examination, that the money, notes, stocks, bonds, mortgages and deeds of trust exhibited to him are the bona-fide property of said company.”

“Sec. 6902. When the corporators have fully complied with the requirements of the preceding sections, and the laws of this State governing the organization of private corporations, and said corporation has deposited with the superintendent of the insurance department the amount of capital required to be deposited by section 6922, and shall have filed with the superintendent a certified copy of the certificate of incorporation issued by the Secretary of State, it shall be his duty to furnish the company a certificate of such deposit, and his certificate of authority for it to commence the business proposed in its charter which, with the certified copies of the aforesaid declaration and certificates, on being filed and recorded in the office of the recorder of the county in which the company is to be located, shall be its authority to commence business

and issue policies; and such certified copies of the declaration certificates and certificate of deposit may be used in evidence for or against said company, with the same effect as the originals."

The statute does not in terms say when the "proposed charter" shall in fact be agreed to, and adopted, but it could not be adopted until the stock was subscribed. The original stock holders are the parties, who can agree to and adopt articles of association or charters. By the terms of the statute the "corporators" as designated in the several sections are only given power to open and keep open books to take subscriptions to the capital stock. They have no stock for sale, and are not authorized to sell stock upon the market or otherwise. They only have proposed stock to be subscribed for by those desiring to become stockholders in the proposed corporation. Under these statutes there is no corporation until the amount of the proposed stock has been subscribed. It is then, and not until then, that there can be a meeting of stockholders to select a board of directors, or to adopt the proposed charter or articles of association. The record before us would indicate that the parties organizing this defendant took this course. All the proceedings seem to appear in the name of the organization committee, until the time came when, as they thought, all the proposed charter capital had been subscribed, whereupon they all met, adopted the proposed charter, selected the board of directors, and such board in turn selected the officers, which we have named. This, however, was all done subsequent to the alleged employment of plaintiff. At the time of plaintiff's employment, neither Starnes, nor his committee, had any stock to sell. Neither Starnes nor his committee had any statutory power to do more than to open and keep open the subscription book. The power granted the original "corporators" by these statutes is not to sell

stock at any agreed price, but to take subscriptions to stock in a proposed corporation, which may or may not reach the point of a corporation. The power to open subscription books and receive subscriptions (and this is the only power conferred by statute) is not broad enough to authorize them to hire an agent to sell stock, for they had none to sell.

To my mind there is a clear purpose in these statutes. That purpose is to have in the hands of the corporation at its final organization the proceeds of the stock subscribed for, whether those proceeds be the cash required to be paid in on such subscriptions, or the secured notes given for the other portion of such subscription. Their purpose is to frustrate a small coterie of corporators from standing to themselves, in an inner ring, as it were, and absorbing a portion of the assets of the proposed corporation at or before the time of its final incorporation. They were designed to have in the treasury at the organization the capital spoken of in the charter.

But whatever the legislative purpose in expressly limiting the power of the original "corporators" as they are designated in the law, the courts can only take the laws as they find them. These laws are not broad enough to authorize the original "corporators" to hire agents to sell stock or proposed stock. We might as well meet the issue squarely, and we do so meet it. Power to open books and take subscriptions to proposed stock, means that the subscriber, and each of them, subscribe for and pay for their stock under the terms of the statute, and that the cash paid or the secured notes given, shall go into the corporate treasury, and it does not mean that the corporators themselves or through hired agents, can obviate this purpose. If they possess the power of giving an agent ten per cent to secure subscribers, if difficulties in getting subscribers required it, more might be given. Nor

does the fact that they agree upon a surplus change the situation. The surplus, if agreed upon as a charter measure, is as much of a trust fund as is the original capital.

We shall not go further in argument. It is sufficient for us to say that the statute has given these corporators no power to employ and pay agents to dispose of stock or proposed stock, and absent this power the alleged contract with plaintiff must fall.

No doctrine of law is better settled than that which says that one who deals with an agent of limited power must deal with him at his peril. These "corporators" were agents with limited power under the statute. The plaintiff in this case knew when he was dealing with Starnes that the corporation stock had not been subscribed. It may be a violent presumption, but it is one nevertheless, that each citizen is presumed to know the law and must make his acts accord therewith. Knowing that the stock had not been subscribed, as plaintiff admits, he, under the law, knew that Starnes could not be acting otherwise than a mere corporator. He knew that as to the proposed corporation these corporators were mere agents with limited power. He dealt with them therefore at his peril. If they or either of them, made the contract with him, his benefit under the contract must be measured by the power of these agents to make it. If they had no such power, as we hold, then he had no valid contract, and we so hold.

II. There is at least another question in this case that settles it adversely to the plaintiff. Plaintiff does not sue in *quantum meruit*. He sues upon a specific contract. That contract is that he was engaged to sell stock or procure buyers for stock, or subscribers for stock at \$200 for each share of \$100 par value, and for services thus rendered, was to receive ten per cent of the amount he so sold. His pleadings are bottomed upon this theory.

Suit on
Contract.

His instructions *nisi* are upon this theory. Upon this theory (the theory upon which the court *nisi* proceeded throughout) his evidence totally failed. No fair reading of the evidence given will show that the plaintiff sold any stock to the Missouri-Lincoln Trust Company at \$200 per share. The uncontradicted proof is that the sale (if it can be called a sale) was made at a price very much less than \$200 per share.

It is true that when it was found that the corporation could not be completed, the Missouri-Lincoln Trust Company put up about \$28,000 more than it had agreed to pay, for incorporation purposes merely, with the understanding that this was to be returned, after the corporation was duly incorporated. It had in the first instance only paid what it had agreed to take over the stock at, viz., \$28,000 or more, less than \$200 per share. This slight-of-hand performance for purposes of evading the corporation laws of this State cannot change the contract price. So that upon the theory upon which this case was pleaded and tried, there was a failure of proof, and the demurrer to the testimony should have been sustained.

The judgment *nisi* should be reversed and it is so ordered. All concur.

JAMES W. HARTER v. WILLIAM T. PETTY et al., Appellants.

Division One, December 21, 1915.

1. JUDGMENT OF PROBATE COURT: Collateral Attack. As to all matters of administration of estates, the orders, judgments and proceedings of the probate court, made in furtherance of the statutory powers devolved upon it, are not subject to collateral attack, unless it affirmatively appears in some portion of the entire record that the steps necessary to the acquisition of jurisdiction were not taken.

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2. ———: ———: **Silence of Record.** Mere silence of the record is not sufficient to overcome the presumption that a given judgment of a probate court was rendered after jurisdiction attached.
3. ———: ———: **Sale of Property Under Execution.** Where a legacy was given to a named legatee, there was money in the hands of the executor sufficient to pay it after all debts and other legacies as shown by the annual settlement had been paid, and more than two years had elapsed since letters testamentary had been granted, it will not be held, in the absence of any contrary showing by the record, that the probate court was without jurisdiction to make an order directing the legacy to be paid and to award execution thereon against the executor; and a sale of the executor's land by the sheriff in pursuance thereof, will not be held invalid on the ground that the probate court was without jurisdiction.
4. **BELATED NOTICE OF ADMINISTRATION: Payment of Legacy.** The fact that the executor delayed for nearly two years after letters testamentary were issued to him the publication of notice of administration will not avail him in an attempt to defeat the sale of his land under execution, in pursuance to an order of court to pay a legacy, made more than two years after the letters were issued, but less than two years after notice was given. He cannot invoke his violation of the statute requiring him to give notice within thirty days, as a ground for defeating either the order or execution.
5. **INTEREST ON LEGACY: Collateral Attack.** Whether or not the probate court erred in allowing interest on the legacy from one year after the grant of administration, instead of from the date of demand for the legacy and refusal to pay it, is of no concern in a collateral attack. Such mistakes, if in fact mistakes, could have been corrected on appeal, and since the probate court had jurisdiction of the matter, its judgment cannot be avoided by a collateral attack.

Appeal from Clinton Circuit Court.—*Hon. Alonzo D. Burnes*, Judge.

AFFIRMED.

W. S. Herndon for appellants.

Appellant submits that the sheriff's deeds, upon which plaintiff bases his right to recover in this case, did not convey any title for the following reasons: (1) The probate court was without jurisdiction

to make the order, in this: There must be a finding at some settlement that there are sufficient funds in the hands of the executor or administrator, after paying all debts and costs, to pay legacies or distributive shares before the court can make such order. Sec. 246, R. S. 1909. In order for the court to determine that there are sufficient funds, the time for proving up claims against the estate must have expired. The time had not expired when this order was made, for the reason the notice of grant of letters was not published until April, 1909. Sec. 191, R. S. 1909; *Clark v. Sinks*, 144 Mo. 449; *State ex rel. v. Grigsby*, 92 Mo. 419. (2) The order was not made at a settlement. There is no provision of the statute which gives a legatee the right to sue for a legacy in the probate court by giving the executor notice that he will apply for such order. The first annual settlement was made May 12, 1909, and the second on June 22, 1911. (3) There was no finding by the court that there were sufficient funds in the hands of the executor, after paying all demands and costs, with which to pay the legacy. Sec. 246, R. S. 1909. Counsel for Tucker recognized that such a finding was jurisdictional and made that averment in their motion. The court did not even sustain the motion, but simply ordered the legacy paid with interest. *Brown v. Glover*, 158 Mo. App. 399. Probate courts are courts of limited jurisdiction and nothing is presumed. Record must show affirmatively that it had jurisdiction. *Gibson v. Vaughn*, 61 Mo. 418; *Strouse v. Drennan*, 41 Mo. 289; *State v. Metzger*, 26 Mo. 447; *Ex parte O'Brien*, 127 Mo. 447; *Cloon v. Beatie*, 46 Mo. 391; *Rohland v. Railroad*, 89 Mo. 180. The averment in the motion of Tucker, filed in the probate court, could not supply the necessary finding in the order. *Orchard v. Store Co.*, 225 Mo. 470. (4) The order for the payment of the legacy was void, for the reason that it allowed interest from December 21, 1908. The filing of the motion on the 14th of Febru-

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ary, 1910, was the only evidence of a demand for the payment of the legacy. If the executor was chargeable with interest, it would be due the estate and not the legatee. The date from which interest was allowed was just one year from the date of letters, and no executor can in any event be compelled to pay a legacy before the expiration of two years. Sec. 245, R. S. 1909. (5) The only power which the probate court had was to order the payment of the legacy when the conditions existed which gave it the power to act. It had no power to give judgment for interest. Sec. 246, R. S. 1909. (6) The motion of James H. Tucker asked for the payment of the legacy of one thousand dollars and interest thereon and the order of the court for the payment of that legacy, and interest thereon from December 28, 1908, stated in the costs named on the execution to be \$81 was in excess of the jurisdiction of the probate court. The statute only gave the probate court jurisdiction when the proper conditions existed to order the payment of the legacy. While that order might bear interest from date of refusal to pay, the court had no power to allow interest and it made the whole order void. 1 Am. & Eng. Ency. Law (2 Ed.), p. 1066; *Smith v. Knowlton*, 11 N. H. 191; *Camp v. Woods*, 10 Watts (Pa.), 118. The notice served on the executor and the motion filed by Tucker asked for the allowance of interest. The court, in acting upon this motion and allowing interest, was assuming jurisdiction exceeding that given it by law, and prohibition would lie. *State ex rel. v. Aloe*, 152 Mo. 483; *State ex rel. v. Wood*, 155 Mo. 445; *State ex inf. v. Talty*, 166 Mo. 552; Sec. 246, R. S. 1909. (7) The execution was void for two reasons, among others, to-wit: (a) Section 235, R. S. 1909, provides that if any executor or administrator fail to pay, when demanded, execution may issue. The record shows that a copy of a written demand was delivered to the executor by the sheriff. This written demand did not au-

thorize the sheriff to collect the money, and his receipt would not have protected the executor, or been a legal voucher, on a settlement. Simply handing the executor a copy of a written demand, signed by Tucker's supposed attorney, is not such a demand as would authorize the issue of an execution, especially on the same day. (b) The same section provides that the execution shall issue on application of the creditor, and section 254 makes it applicable to legatees. The record does not show that such application was made, nor does the execution so state. The same section provides that such execution shall issue against such executor or administrator. The execution was against William T. Petty, simply. (8) The order made on the 17th of July, 1911, on the application of the executor, for distribution of \$4,200, excepted James H. Tucker et al., on account of a suit against them in the Linn Circuit Court. This shows that the legatee, James H. Tucker, was indebted to the estate, at least that he was sued by the executor. If the court will take judicial notice of that suit, which was finally adjudicated by the Kansas City Court of Appeals, and is reported in 166 Mo. App. 98, it may throw some light on the controversy between the executor and Tucker. (9) No suit can be maintained against any executor or administrator for the payment of a legacy or distributive share until all claims are barred by the special statute or limitations. In this case no claims against the estate of James Ward, deceased, were barred until two years after the publication of notice in April, 1909, that notice not having been published within thirty days from the date of letters. Sec. 191, R. S. 1909; Wiggins v. Lovering, 9 Mo. 262; Wilson v. Gregory, 61 Mo. 421.

Lavelock & Kirkpatrick for respondents.

The principal defense, and the only defense offered by appellant, is a collateral attack upon a judg-

ment and order of the probate court and the proceedings thereunder. (1) A collateral attack, as defined by the authorities, is any proceeding not instituted for the express purpose of annulling, correcting or modifying a judgment or decree. *Johnson v. Realty Co.*, 167 Mo. 341; *State v. Jeager*, 157 Mo. App. 339. (2) In collateral proceedings, no inquiry can be had as to errors of either fact or law. The judgment is conclusive as to these. *Hope v. Blair*, 105 Mo. 94. (3) Appellant, in the trial of this cause, offered in evidence Exhibit "D", being the motion filed in the probate court by James H. Tucker, praying for an order on the executor of the estate of James P. Ward, deceased, to pay legacy bequeathed to the said James H. Tucker. In this proceeding, in view of the judgment rendered thereon, the silence and non-appearance of the appellant thereto, the law conclusively presumes that the court then found that all the debts, demands and special legacies of said deceased, except the legacy to James H. Tucker, had been paid in full, that there yet remained an unexpended amount in the hands of said executor in the sum of \$8750, and that the notice of letters had been published as required by law. *In re Tucker*, 74 Mo. App. 334; *State v. McCord*, 124 Mo. App. 73; *State v. Searcy*, 39 Mo. App. 401. (4) The execution issued May 24, 1910, was against the executor of the last will and testament of James P. Ward, deceased, as directed by statute, yet it was against W. T. Petty, who was such executor, and it was against said W. T. Petty individually, and not in his trust capacity, hence it was properly issued against W. T. Petty, who was such executor. Sec. 235, R. S. 1909. (5) Where the record of the probate court fails to recite a finding as to the facts, but shows that the court exercised jurisdiction, the presumption is that it found the facts necessary to give it jurisdiction. *State v. McCord*, 124 Mo. App. 73. (6) The probate court was not required to make any record finding as

to the sufficiency of funds, the payment of demands and costs, or the publication of the notice of letters. *State v. McCord*, 124 Mo. App. 73; *State v. Searcy*, 39 Mo. App. 401; *State v. Dugan*, 110 Mo. 145; *Livingston v. Allen*, 83 Mo. App. 298. (7) A judgment which is not void as it appears from the record, is not subject to collateral attack. *Myers v. McRay*, 114 Mo. 382. (8) Errors, if any, either in law or fact, were merged in the order of the probate court, directing W. T. Petty to pay the legacy bequeathed to James H. Tucker, and are no longer the subject of judicial inquiry. *Covington v. Chamblin*, 156 Mo. 587.

I.

BOND, J.—The plaintiff is the grantee of J. H. Tucker, who acquired a sheriff's deed to forty acres of land theretofore belonging to defendant W. T. Petty, who was the executor of the will of J. P. Ward and charged with the payment of a legacy to the said Tucker of one thousand dollars.

The will of J. P. Ward was probated December 21, 1907, on which day letters testamentary issued to the executor, who omitted to give notice thereof by publication until 1909, and made his first annual settlement in May, 1909. On February 14, 1910, the probate court, on the application of the legatee, ordered the executor to pay the amount of the legacy, less a collateral inheritance tax of \$50, to-wit, \$950, with interest from the twenty-first of December, 1908.

Due notice was given to the executor of the application for this order on Tuesday, February 1, 1910, and a copy of the application was thereafter, to-wit, the 24th of May, 1910, served on him, on which day also an execution was issued against him and levied on forty acres of land, and the same sold and purchased by the legatee, who received a sheriff's deed for the land and afterwards conveyed it to the plain-

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tiff, who brought the two present actions against defendant Petty and the several parties in possession.

The first count of each suit is to quiet title and the second is in ejectment. The case was submitted to the court without a jury and a judgment rendered for plaintiff, from which defendant Petty has appealed.

II.

No question is made as to the formal sufficiency of the sheriff's deed to the grantor of plaintiff, nor that the plaintiff acquired whatever title passed to his vendor under that deed.

Judgment of
Probate Court.

The chief contention of appellant is that the probate court was without any jurisdiction to make the order or render the judgment against the executor for the payment of the legacy bequeathed to Tucker, the grantor of the plaintiff, and hence the ulterior proceedings for its enforcement were simple nullities and carried no title to the land levied upon and sold to satisfy the judgment.

Under the record in this case this position cannot be maintained. As to all matters of administration of estates and in furtherance of statutory powers devolved on them for that purpose, the orders, judgments and proceedings of the probate court are entitled to the same presumptions of regularity and validity, when assailed collaterally, that exists when a similar attack is made upon the judgment of courts of general jurisdiction which proceed according to the course of the common law. This principle, despite some vacillation in the earlier cases, is now the accepted law of this State. [Wilson v. Wilson, 255 Mo. l. c. 537, and cases cited.] The judgments and proceedings of a court entitled to these presumptions will be upheld against collateral attack unless it affirmatively appears in some portion of the entire record that the steps necessary to the acquisition of jurisdic-

tion were *not* taken. The mere silence of the record is not sufficient to overcome the presumption that the given judgment was rendered after jurisdiction had attached.

Taking the face of the record of all the proceedings which culminated in the judgment against the executor, there will be found nothing to prove that the probate court was without jurisdiction to render it. The defendant executor, though duly notified of the demand for judgment and the grounds therefor (R. S. 1909, secs. 244, 245, 246, 233, 235), made no appearance and judgment was rendered against him. In the absence of any contrary showing in any part of the record we must presume that this order was only made after a finding by the court of the grounds upon which it was asked. These in substance were, that a legacy of one thousand dollars was given to the legatee in the will whereof the defendant was executor; that there was money in the hands of the executor amounting to \$8751 left after the full payment of all the debts and other legacies as shown by this settlement, and that more than two years had elapsed since the granting of letters. Assuming that evidence of these allegations was adduced it cannot be said in view of the statutes cited above, that the probate court was without jurisdiction to make the order of payment and award execution thereon against defendant.

III.

But appellant further contends that, since he failed to publish, as required by law, the facts of the issuance of letters of administration to him, therefore the legatee had no right to demand payment until two years after the belated publication of such notice, which was about a year and a half after the grant of the letters.

**Belated Notice
of Administration.**

This defence is not available under the present record. It was the personal misfeasance of the executor that the statute requiring such publication within thirty days was not complied with. He cannot for that reason set up his own violation of duty as a defense to a cause of action which would have accrued to the legatee within the time his demand for payment was made, if the executor had obeyed the mandatory statute. [R. S. 1909, sec. 82.] If the executor has the power to postpone the demand for legacies until such publication of notice of letters and should refuse to make publication, then it necessarily follows that his misconduct would not only prejudice the rights of legatees, but would contravene the statutory purpose to effect a speedy closure of the administration of estates. [Laws 1911, pp. 81-6.]

His action in the present instance was unmoral if not in bad faith, and was no bar to the demand of the legatees for payment which was filed within the term of the statute then in force, permitting the demand for legacies after two years from the *date of letters* upon executing a bond, which latter requirement was waived by his non-appearance to this suit for the legacy. [R. S. 1909, secs. 244, 245; Pound v. Cassity, 166 Mo. l. c. 428.]

IV.

It is finally urged by appellant that he should not be charged with interest from one year after the grant of letters, but only from the date of the demand for the legacy and after refusal to pay. The judgment embracing this item of interest was an appealable one, and if erroneous in that respect the executor could have had redress on appeal. [R. S. 1909, sec. 289.]

The probate court was possessed of jurisdiction to pass on the demand for interest, and even if it

erroneously exercised that jurisdiction in allowing too much interest, its judicial action cannot be questioned in the collateral attack made by appellant. Nothing can be further apart than an utter absence of jurisdiction to decide a case, and a mere mistake of law and facts made in the decision of the case of which a court has lawful jurisdiction. [Rivard v. Railroad, 257 Mo. l. c. 167.]

A misapprehension of these diverse functions has created some confusion and lack of clarity in the decisions of some courts. No error however gross, occurring in the exercise of the rightful power to decide a case, can become the basis of a collateral attack upon the judgment. Such imperfections of judicial action can only be remedied by a review on appeal, or writ of error, or other mode of direct attack.

Our conclusion is that the judgment of the probate court upon which the sheriff's deed was founded is impregnable to the collateral attack made in the record before us. It is therefore affirmed. All concur.

THE STATE ex rel. JOHN JACOB DICK et al. v.
JOHN WIETHAAPT et al., Judges of County
Court.

Division One, December 21, 1915.

1. **DRAMSHOP LICENSE: Granted During Term at Which Petition is Filed.** Section 7201, Revised Statutes 1909, declaring that the petition for a dramshop license "shall be filed in the office of the Clerk of the County Court not less than ten days before the first day of the court to which it is to be presented and remain on file for public inspection and by said clerk laid before the court at the first term thereafter, and all dramshop licenses issued contrary to the provisions of this section shall be void," does not render invalid a dramshop license granted at the same term at which the petition was filed. The language requiring the clerk to lay the petition before the court at

State ex rel. v. Wiethaupt.

the first term thereafter simply imposed on him a ministerial duty for the benefit of the applicant, and was never intended to invalidate a license granted by the court in due form at the same term; and especially should such license not be held void for the reason it was granted at the same term the petition was filed, where the applicant with his attorney and the remonstrators were in court at the appointed time, and the application was heard on its merits. [Following *State v. Evans*, 83 Mo. 319; and disapproving *State ex rel. v. Wiethaupt*, 165 Mo. App. 634.]

Held, by WOODSON, J., dissenting, that the statute is not directory simply, but mandatory, nor was it intended for the benefit of the applicant, but was intended to give to the inhabitants of the county an opportunity to be heard and to remonstrate; and the clause declaring that "all dramshop licenses issued contrary to the provisions of this section shall be void" did not have reference only to the filing of the petition, but clearly makes void a license granted at the same term the petition is filed.

2. ———: ———: *Inspection of Petition.* But a dramshop license cannot be granted or the petition therefor heard until ten days after the petition has been filed with the County Clerk. That part of the statute (Sec. 7201, R. S. 1909) is mandatory, and was enacted in order that citizens of the county might have ample opportunity for inspection of the petition, and to file a remonstrance, etc.

Transferred from St. Louis Court of Appeals.

REVERSED AND REMANDED (*with directions*).

Eliot, Chaplin, Blayney & Bedal for relators.

The judgment or order of the county court granting a dramshop license at the same term of court at which the petitions of the assessed tax-paying citizens and guardians of minors of the block and municipal township are filed is void. Sec. 7201, R. S. 1909; *State ex rel. v. Heege*, 37 Mo. App. 338; *State ex rel. v. Mitchell*, 127 Mo. App. 455; *State ex rel. v. Higgins*, 84 Mo. App. 531.

E. W. Mills and *George B. Logan* for respondents.

RAILEY, C.—On application of relators, a writ of *certiorari* was issued by the St. Louis Court of

Appeals in March, 1912, commanding the County Court of St. Louis County, Missouri, to transmit to said Court of Appeals, the record of the proceedings had in the said County Court in the matter of the application of Charles S. Kinney for a dramshop license. In obedience to said writ, the respondents herein made full return to said Court of Appeals of all such proceedings, including the original papers.

It appears from relator's written application for said *writ of certiorari*, that the petition of said Kinney for a dramshop license was filed before the Clerk of the County Court of said county on the 17th day of February, 1912. It further appears therefrom that the regular term of said County Court opened "February 5, 1912, and was adjourned to February 9, 1912; on which day the court adjourned to February 16, 1912; on which day the court adjourned to February 19, 1912; on which day the court adjourned to February 23, 1912; on which date the court adjourned to February 26, 1912; on which date the court adjourned to February 29, 1912; on which date the court adjourned to March 1, 1912; on which date the court adjourned to March 4, 1912; on which date the court adjourned to March 8, 1912."

Said application further alleges, that the Clerk of said County Court laid before the latter on March 4, 1912, the application of Kinney, his petitions, bonds, etc., and that said court on said date granted said Kinney a license to keep a dramshop as prayed for, etc. The above application for the writ of *certiorari* was duly verified.

Respondents in their return, which is not contradicted, allege that said petition for a dramshop license was duly filed with the Clerk of said County Court on February 17, 1912; that on February 20, 1912, relators and others filed a remonstrance against the granting of said dramshop license; that said pe-

tioners and remonstrators appeared in person and by attorneys before said County Court, and the issues raised by the petition and remonstrance were then heard by said court; that evidence was presented by both petitioners and remonstrators, and that said evidence and oral arguments by attorneys were duly heard by said court. The return further shows that said Kinney had met the requirements of the law, and was entitled to his dramshop license, so granted, unless the proceedings of said court were void. Upon a final hearing of said cause in said Court of Appeals, Judge NORTON wrote an opinion, in which Judge CAULFIELD concurred, quashing the proceedings of said county court in respect to the matter aforesaid. Judge REYNOLDS, of said court, dissented in an opinion filed. The majority opinion concludes as follows:

“However, we deem the judgment here given to be in conflict with the views expressed by the Kansas City Court of Appeals in *State ex rel. Reider v. Montebau County Court*, 45 Mo. App. 387, and, therefore, certify the case to the Supreme Court for final determination.”

Under and pursuant to the order of said Court of Appeals aforesaid, all the records and proceedings in said cause which were before the Court of Appeals, together with copies of the opinions aforesaid, were duly transmitted to this court as required by law. The opinions of said judges are printed in full in 165 Mo. App. 634 et seq.

On the record thus presented, relators insist that said county court was without jurisdiction, while respondents contend that as all the jurisdictional facts necessary to warrant the court in issuing the license were affirmatively found and entered of record by the court, that its action was regular and that the order granting said license, made by it on the 4th of March aforesaid, was valid.

I. The St. Louis Court of Appeals in this case quashed the judgment of the County Court of St. Louis county, Missouri, rendered on March 4, 1912, granting to Charles S. Kinney a dramshop license, on the alleged ground that the petition for a license was filed before the Clerk of said County Court on the 17th of February, 1912, during the regular February Term, 1912, of said County Court, and that the judgment of said court, granting said license, was rendered on the 4th of March, 1912, and during the regular February Term aforesaid. Judge REYNOLDS dissented, in an opinion filed. The case was certified here, because the conclusion reached by the majority of said court was said to be in conflict with the opinion of the Kansas City Court of Appeals in *State ex rel. Reider v. Moniteau County Court*, reported in 45 Mo. App. at pages 387 and following, wherein, Judge ELLISON, speaking for said court, held that a petition for a dramshop license could be filed and a license granted during the same term of the County Court.

A number of authorities are referred to by counsel in their briefs, although but few of same throw any light on the questions before us. In passing upon the case, it becomes necessary for us to construe section 7201, Revised Statutes 1909, as the conclusion reached will be decisive of the case. That part of section 7201, *supra*, necessary for us to consider in passing upon the question involved, reads as follows:

"Which said petition [for dramshop license] shall be filed in the office of the clerk of the county court not less than ten days before the first day of the court to which it is to be presented and remain on file for public inspection and by the said clerk laid before the court at the first term thereafter, and all dramshop licenses issued contrary to the provisions of this section shall be void."

In arriving at a correct interpretation of above section, we deem it important to refer to the antecedent laws upon this subject as they existed in this State from 1865 up to the enactment of the present law, which occurred in 1901. [Laws 1901, p. 142.] Section 8 of chapter 98, General Statutes 1865, p. 420, relating to this subject, reads as follows:

“Which said petition shall be filed in the office of the clerk of the county court, and by said clerk laid before the court at the first term thereafter . . . and all dramshop licenses issued contrary to the provisions of this section shall be void.”

The language just quoted, will be found in section 5442, Revised Statutes 1879; in section 4 of the Laws of 1883, at pages 87-8, and in section 4576, Revised Statutes 1889.

In 1891 (Laws 1891, pages 129 and 130), the language in regard to the above subject was slightly changed. Section 8 of said act reads as follows:

“Which said petition shall be presented to the county court or *other authority*; and all dramshop licenses issued contrary to the provisions of this section shall be void.”

The same language just quoted was used in section 2997, Revised Statutes 1899.

In 1901 (Laws 1901, p. 142), said section 2997, Revised Statutes 1899, was changed, so as to read as we find it in section 7201, Revised Statutes 1909, at the present time.

It is generally known that for many years after the conclusion of the Civil War in this country, there were but few counties in our State without licensed dramshops. Later, public sentiment began to change in regard to the sale of liquor in many counties of the State, until ultimately but few are left in which the sale of intoxicating liquor is legally permitted within their borders. *From 1865 to 1901, an applicant for license was simply required to file his petition with*

the clerk, and upon proper proof made, procure a license from the county court, not only at the same term, but on the same day the petition was filed. In the well considered and often cited case of *State v. Evans*, 83 Mo. 319, the defendant, as shown by the record here, filed his petition for a dramshop license in Cass county, Missouri, on *December 21, 1883*. The county court *on the same day*, over the protest of a remonstrator, *granted defendant a dramshop license*, and caused its record to recite the necessary jurisdictional facts which, it was held, legally warranted the granting of said license. Section 4 of the Laws of 1883, pages 87-8, was in full force and effect when said license was granted. It reads in respect to the matter under consideration, as follows:

“Which said petition shall be filed in the office of the clerk of the county court and by said clerk laid before the court at the first term thereafter . . . and all dramshop licenses issued contrary to the provisions of this section shall be void.”

Defendant Evans was indicted for selling intoxicating liquor without a license, on the theory that his license above granted was void. The circuit court at the trial permitted the State to *ignore* said license and introduce evidence tending to show that defendant was not entitled to it. He was convicted, appealed to this court, and the judgment below was reversed and defendant discharged. The ruling in the Evans case *supra* necessarily determined that he had the legal right to *file his petition and procure a license on the same day of the term*. The conclusion necessarily reached in disposing of said case treated that portion of section 4 *supra* directing the clerk to lay the application before the court at the first term thereafter, as merely directory and not mandatory, as held by Judge THOMPSON in his dicta to the opinion in *State ex rel v. Heege*, 37 Mo. App. 338. The construction placed upon section 4 of the Act of 1883 *supra*, in the

Evans case, by Judge MARTIN, Commissioner of this court, meets with our approval.

It is manifest that the direction to the clerk to lay the petition before the court at the first term thereafter, contemplated that a petition *might* be presented to the clerk and filed in vacation more than ten days before the first day of the term, and yet the clerk, were it not for this section, might arbitrarily pigeon-hole the application until the term had passed. Especially might the foregoing happen, where the applicant *anticipates no opposition*, and leaves his papers properly and timely executed with the clerk, relying on him to call the attention of the court thereto. The language used in reference to the clerk in section 7201 supra simply requires of him a ministerial act for the benefit of the applicant, and his failure to comply with the requirement of the statute was never intended to invalidate a license granted by the court in due form, and especially is this true where the applicant is in court with his attorney, and tries the case upon its merits with the remonstrators before the court at the appointed time, as in this case.

II. Section 7201, Revised Statutes 1909, among other things provides, that:

"Said petition shall be filed in the office of the clerk of the county court not less than ten days before the first day of the court to which it is to be presented and remain on file for public inspection."

This language first appeared in Laws 1901, page 142. As heretofore suggested, public sentiment had been undergoing a change in respect to the sale of intoxicating liquors before the last named act was passed. Those *opposed* to the sale of liquor were not satisfied with the then existing condition of affairs, and were manifestly demanding a change in the law. As matters stood up to the passage of the Act of 1901, a dramshop

Inspection
of Petition.

keeper could have his papers prepared; placed in the hands of another, and presented to the court at an opportune time, when those desiring to remonstrate were ignorant of what was transpiring, and in this manner obtain a license, which might otherwise have been refused. The Legislature, therefore, in 1901, passed the above act for the evident purpose of giving those opposed to the issuance of a license an opportunity to be heard before it was granted. Instead of permitting the petition to be filed and taken up at once, without notice, as the applicant had the right to do under the law when the Evans license was granted in 1883, the applicant is now required to file his petition in the office of the Clerk of the County Court not less than ten days before the first day of the court to which it is to be presented, and it is required to *remain on file for public inspection*.

The manifest purpose of the above language, was to give the community interested an opportunity to show cause why the license should be refused. It was required to remain on file in order that those interested might know *what* they had to meet, and prepare to defend against the issuance of the license. It would be wholly immaterial to the public or remonstrators whether the case was tried during a regular, adjourned or special term, so the petition gave ten days notice and remained on file for the inspection of the public.

The language of the act requiring the petition to be filed as aforesaid and to remain on file in the office of the county clerk for not less than ten days before the day of trial, or the granting of the license, is *mandatory*, and must be complied with before a valid license can be obtained; but on the other hand, we hold that a petition filed in the office of the clerk of the county court on the 17th of February, 1912, and which remains on file until the 4th of March of the same year, when a trial is then had and the license granted, is a substantial compliance with the requirements of said

section 7201, in respect to above matter, even if the petition is filed in the office of the County Clerk and the license *granted during the same term of court.*

The conclusion therefore reached by the Kansas City Court of Appeals, speaking through Judge ELLISON, in the case of State ex rel. Reider v. County Court of Moniteau County, 45 Mo. App. 387, properly declared the law in respect to foregoing matters.

III. Judge NORTON in the majority opinion certified to this court and reported in 165 Mo. App. 634, at page 643, after reviewing certain cases, said:

"In view of these authorities and the statutes above quoted, providing for an adjourned term of the County Court, it seems clear that the Legislature intended to confer jurisdiction on the County Court to grant a dramshop license at the first adjourned term thereafter—that is, after filing the petition—provided the petition remained on file with the clerk for inspection ten days before the first day of such court, that is, the adjourned term.

"But though such be true, the record before us does not reveal the petition to have been filed ten days before and that it was acted upon at an adjourned term. On the contrary, it appears to have been both filed and acted upon during the regular February term, and not ten days before a term of the court of any character.

"The return before us discloses the petition was filed on February 17th and that it was presented to the court and acted upon during the February term, on March 4th thereafter. Obviously, more than ten days had elapsed after the petition was filed, but it does not appear the court was in session at an adjourned term."

We have pointed out in the statement of the case that the court was not in session on February 17, 1912, when the petition for a license was filed in the clerk's

office. The verified petition, filed by relators in the St. Louis Court of Appeals on which the *writ of certiorari* was issued, on page three of same, shows that the County Court adjourned on February 16, 1912, to February 19, 1912; "on which date the court adjourned to February 23, 1912; on which date the court adjourned to February 26, 1912; on which date the court adjourned to February 29, 1912; on which date the court adjourned to March 1, 1912; on which date the court adjourned to March 4, 1912."

We do not find anything in the return which is contradictory of the foregoing matters. We presume the Court of Appeals must have overlooked the uncontradicted and verified averments of relator's petition, which shows that the application for a license was filed in the office of the Clerk of the County Court on February 17, 1912, *while the court was not in session, and that the court held on March 4, 1912, was an adjourned term.* It is fair to assume that, if the attention of the Court of Appeals had been directed to the above statements of relators in their petition, the judgment quashing the proceedings of said County Court might not have been entered in the cause. The conclusion heretofore reached is not in harmony with the views and judgment of the St. Louis Court of Appeals as expressed in the majority opinion of Judge NORTON and concurred in by Judge CAULFIELD.

We accordingly reverse and remand the cause, with directions to the St. Louis Court of Appeals to set aside its judgment quashing the judgment of the County Court of St. Louis County, Missouri, rendered on March 4, 1912, granting Charles S. Kinney a dram-shop license, and to otherwise dispose of the case in conformity with the views here expressed.

Brown, C., not sitting.

PER CURIAM.—The foregoing opinion of RAILLEY, C., is hereby adopted as the opinion of the court. *Graves, P. J.*, and *Bond, J.*, concur; *Blair, J.*, concurs in paragraphs one and two and in result; *Woodson, J.*, dissents in opinion filed.

WOODSON, J. (dissenting).—I dissent from the opinion of our learned Commissioner in this case for the reason that in my judgment that clause of section 7201, Revised Statutes 1909, providing that the petition shall be filed in the office of the clerk of the county court and by him laid before the court at the first term thereafter, is not directory, nor was it intended for the benefit of the petitioner for a license to run a dram-shop; but upon the contrary, in my opinion, the clear design of the Legislature was to give the residents of the community in which it is proposed to operate a saloon, an opportunity to become informed of the facts of the case and present remonstrances against the granting of the license.

If that was not the intention of the Legislature, then why did it declare in the subsequent clause of the same section that all licenses issued in violation of this section should be void? There are but two clauses in the section, and it can hardly be said that the avoiding clause had reference only to the filing of the petition, for the reason that the county court is a court of record, and can only speak through it, and of course it could not act at all unless the petition had been first filed, any more than the circuit court can render a judgment in a cause without a petition filed, stating the facts constituting the cause of action. Such a judgment of the circuit court, if rendered, would be absolutely null and void, notwithstanding we have no such statute as the one under consideration, declaring such a judgment should be void in such a case. The Constitution would accomplish that effect.

So would it accomplish the same effect on the order of the county court granting the license if the county court, under that statute, should grant the license without the petition having been first filed, although the statute had not contained the annulling clause.

I do not mean to state that the Legislature has not the power to confer upon the *judges* of the county court the authority to issue such a license upon such a petition without it has first been filed; but what I do mean to say is, that the *county court, as a court*, could not act under that statute unless the petition for the license had first been filed therein as prescribed for by that statute; and if it should so act, without its having been filed, then the order granting the license would be void, without enforcing the nullifying clause of the statute.

If that is true, which in my opinion it is, then, as previously stated, it can hardly be said that the annulling clause of the statute has, to say the least, reference only to the filing part of the clause thereof; but upon the other hand, to give to the nullifying clause of the statute any substantial force and effect, it must be construed to mean just what the Legislature said, namely, that the petition should be first filed, and second that it should lay over until the next term before the court could act upon the petition, and if both of those requirements were not complied with, the license should be void.

I am therefore of the opinion that the case of State v. Evans, 83 Mo. 319, and State ex rel. Reider v. Moniteau County Court, 45 Mo. App. 387, should be overruled, and that the writ of *certiorari* should be made permanent.

THE STATE at the Relation and to the Use of
EDMOND KOELN, Collector of City of St. Louis,
v. JOHN SCULLIN, Appellant.

Division One, December 21, 1915.

1. **TAXATION: Assessment: District Assessor.** The assessment of personal property in the city of St. Louis, wherein there are ten assessment districts, should be made by the District Assessor, and not by the President of the Board of Assessors.
2. ———: ———: **Upon Information.** The District Assessor called at defendant's residence and there left a blank on which defendant was required to make return of his personal property for taxation, the blank being detached from a stub in the Assessor's book. On the stub the District Assessor made a memorandum of \$50,000 for stocks and bonds and \$10,000 for other personal property, and the book was turned in to the Assessor's office. Thereafter the District Assessor and the President of the Board of Assessors had a conversation regarding defendant's assessment, and the old stub having been destroyed, a new stub was made out, upon which defendant's assessment was fixed at \$500,000, the figures being made by the District Assessor and the stub signed by him, the President saying, "I will be responsible." On the bottom of the stub \$1,000,000 was written by some undisclosed person in red ink, an attempt being thereby made to double the assessment. No attempt was made to ascertain if defendant's personal property exceeded the value of \$60,000 made by the District Assessor, the only evidence on the point being that the District Assessor testified that, when he was requested to change the assessment to five hundred thousand dollars and had stated he did not know just exactly what property defendant had, the President said defendant was a very wealthy man, and the President, who had no personal knowledge of what property defendant owned, testified that he had in some way obtained a typewritten report from some one, he knew not whom, which showed defendant was worth nothing less than five hundred thousand dollars. *Held*, that the second assessment was not made upon information furnished by the President, nor was it the semblance of an assessment, but was invalid, being a bald usurpation of authority on the part of the President.
3. ———: ———: **Doubling.** And the doubling of the illegal assessment of \$500,000 was likewise a bald usurpation of authority. The doubling of an assessment is not made automatically by the law, but must be made by the assessor.

Appeal from St. Louis City Circuit Court.—*Hon.
George C. Hitchcock*, Judge.

REVERSED AND REMANDED (*with directions*).

*Boyle & Priest, Blodgett & Rector and Douglas W.
Robert* for appellant.

(1) The power to make an assessment is vested only in the district assessor. The President of the Board of Assessors has the power neither to make nor raise nor double an assessment. R. S. 1909, secs. 11352, 11353, 11518; City Charter, art. 5, secs. 16, 18; State ex rel. v. Alt, 224 Mo. 493; State ex rel. v. Dillon, 87 Mo. 487; Western Ranches v. Custer Co., 72 Pac. 659; Land Co. v. Custer Co., 72 Pac. 662; Rich Hill Co. v. Neptune, 19 Mo. App. 442. (2) A prima-facie case made does not place upon the defendant the duty of overcoming it by a preponderance of the evidence. Sec. 11487, R. S. 1909; Berger v. Commission Co., 136 Mo. App. 42; Thayer's Cas. Ev., p. 44. (3) Instruction 3, by fixing the amount of the damages, assumes that the purported assessment of \$500,000 was doubled as required by law, and the evidence is that the district assessor did not double that assessment. Crow v. Railroad, 212 Mo. 589. (4) No notice having been served, the assessments were void. State v. Cummings, 151 Mo. 49; Mining Co. v. Neptune, 19 Mo. App. 438. (5) Instruction A asked by the defendant and refused should have been given. It submits to the jury the question whether Cook did in fact make and file the assessment for \$60,000. (a) The assessment for \$60,000 made by the district assessor could not be raised without notice to Scullin. (b) This assessment being final, the power was exhausted for that period of time. State ex rel. v. Spencer, 114 Mo. 574; State ex rel. v. Van Every, 75 Mo. 530; Mining Co. v. Neptune, 19 Mo. App. 438; Relfe v. Ins. Co., 11 Mo. App. 379;

State v. April Fool M. Co., 26 Nev. 87; Oliver v. Carsner, 39 Tex. 396.

Edw. W. Foristel and *Frank H. Haskins* for respondent.

(1) It devolved upon defendant to show that the assessment was irregular and he must show this by a preponderance of evidence. State ex rel. v. Vogelsang, 183 Mo. 17; State ex rel. v. Fullerton, 143 Mo. 682; State ex rel. v. Mastin, 103 Mo. 508; State ex rel. v. Philips, 137 Mo. 259; Ketchum v. Railroad, Fed. Cases No. 7738. (2) The memorandum of \$60,000 made by Cook at the time of leaving the notice was not an assessment. State ex rel. v. Cook, 82 Mo. 185; State ex rel. v. Carr, 178 Mo. 238; Bank v. Jordan, 16 Ore. 113; State ex rel. v. Cummings, 151 Mo. 49; R. S. 1909, sec. 11352. (3) Even if it did constitute an assessment it could be corrected at any time before final entry upon the tax books and offer to the public for inspection. People v. Supervisors, 15 Barb. 607. (4) The assessment was made and doubled by the district assessor.

WOODSON, J.—The respondent instituted this suit in the circuit court of the city of St. Louis against the appellant to recover delinquent personal taxes for the year 1910.

The trial resulted in a judgment in favor of the former and against the latter for the sum of \$32,154.48 taxes and \$1607.72, for costs and attorneys' fees. In due time and proper form the appellant appealed the cause to this court.

Under the view we take of the case it will be necessary to decide but one of the numerous propositions presented by this record for determination, and we will therefore state such of the facts of the case as will fully develop that proposition.

The main facts of the case about which there is little or no dispute are substantially set forth by the counsel for the respective parties in their statements of the case; which we will largely adopt. Such additional facts as may be necessary for a proper disposition of the case will be added by the court.

Said statement of counsel is substantially as follows:

This is an action by the State of Missouri, at the relation and to the use of Edmond Koeln, Collector of the city of St. Louis, against John Scullin, to collect delinquent personal taxes due for the year 1910. The case was tried before a jury and judgment rendered in favor of plaintiff and against defendant in the sum of \$32,154.48, together with costs, which costs included attorney's fee of \$1607.72.

Plaintiff introduced in evidence the certified copy of the tax bill filed with the petition and also the contract between the City Collector and his attorney, the said contract showing that the attorney was entitled to five per cent of the amount of the judgment as compensation for his services.

Plaintiff introduced no further evidence. Defendant's evidence showed that in July or August, 1909, Michael Cook, who was District Assessor for the First District of the city of St. Louis, Missouri, being the district in which defendant then resided, called at defendant's residence and there left a blank on which defendant was required to make return of his property for taxation. That blank was attached to a stub in the District Assessor's book. On that stub Cook made a memorandum of \$50,000 for bonds and stocks and \$10,000 for other personal property. This stub was turned in to the Assessor's office. Defendant made no return for taxation for the year 1910, and had not made a return for eighteen years.

About October, 1909, Christian Brinkop, who was President of the Board of Assessors, and his son Walter Brinkop, had a conversation with Cook regarding defendant's assessment. According to the deposition of Cook, a new stub was made out in which defendant's assessment was fixed at \$500,000 and this was substituted for the old stub and the old stub was destroyed, but by whom is not made clear; by the evidence Brinkop had it the last time it was seen. The figures on the new stub were placed there by Cook in his own handwriting. According to Cook's testimony he fixed the assessment at five hundred thousand dollars at the request of Walter Brinkop, Cook testifying "Walter told me to make out a stub for five hundred thousand dollars," and "Mr. Brinkop said, 'You sign that, Mr. Cook; I will be responsible.'"

I will here state the facts a little more in detail.

The evidence shows that Michael Cook was the District Assessor of the First District of the city of St. Louis, Missouri, in the year 1909. In July of that year he called at the home of the defendant, 5218 South Broadway in the First District, wrote Mr. Scullin's name and address on the blank furnished by the city and left it there. On the stub of this blank he endorsed \$50,000 for bonds and stocks and \$10,000 for horses, vehicles of all kinds, automobiles, silverware and household goods in general, a total of \$60,000. This stub, which was No. 2799, he turned in to the office of the President of the Board of Assessors in October of 1909.

In December, 1909, Christian Brinkop, President of the Board of Assessors, and Walter Brinkop, son and chief deputy of Christian Brinkop, called Cook into the private office, and Walter told Cook in Christian's presence they wanted a new stub made out, and to make one out for \$500,000. Christian Brinkop then said, "You sign that, Mr. Cook, I will be responsible."

Thereupon Cook at their suggestion wrote \$500,000 on the new stub in lead pencil. This new stub has the number 68788 on the top, and that was scratched out and No. 2799 written in place of it. The figures \$500,000 were written by Cook in pencil and at the bottom of the new stub the figures \$1,000,000, were written in red ink by someone else. The old stub was then destroyed. Cook did not double the assessment to \$1,000,000, and only made the assessment of \$500,000 as requested, and this was done at the suggestion of Walter Brinkop in Christian Brinkop's presence. Christian Brinkop testified that "the office" doubled the assessment.

Joseph H. Weber, a clerk in the office of the Assessment of Revenue for the city of St. Louis, answered a *subpoena duces tecum*, and brought with him all of the affidavits made by the district assessors for the collection of 1910. There are ten districts in the city of St. Louis, numbered from 1 to 10. Weber testified he could find only the affidavits of assessors for districts 2 to 10 in the office. He made a thorough search for the affidavit of the assessor for the First District, but was unable to find that, and that was the only one of the ten affidavits which was missing. Weber also had made a search for the original stub on which the \$60,000 assessment was made and that could not be found in the office of the Board of Assessors.

Mr. Cook's account of the substitution of the \$500,000 stub for the \$60,000 stub is as follows:

"Q. After you turned in that stub, what, if anything, occurred with reference to filling out another stub? A. Well, it was just this way: Mr. Brinkop had a private office and the other we called the general office. I was in the general office and the son, Walter Brinkop, was with his father.

(Interruption by objection.)

"Q. Who was Walter Brinkop? A. A son of

Christian Brinkop, President of the Board of Assessors.

"Q. What position did he hold in the office? A. One of the chief clerks. There's two chief clerks. They got a hundred and fifty each. He was one of them.

"Q. He was the chief clerk of the President of the Board of Assessors? A. Well, he was his private clerk in a way, gave orders.

"The Commissioner: Gave orders from whom, Mr. Cook? A. Mr. Brinkop.

"Q. And to whom? A. To the assessors, clerks and everybody.

(Interruption by objection.)

"Q. Now, will you please relate, Mr. Cook, what occurred on this particular occasion that you started to refer to? A. Well, he said his father wanted to see me in his private office.

"Q. Did you go into the private office? A. Yes, sir.

"Q. Of Mr. Christian Brinkop? Yes, sir.

"Q. About what date was this, Mr. Cook? A. I couldn't say, sir. That was in the fall of the year, at the same time this suit was being brought—before this suit was brought.

"Q. Well, was it before the last day of December of 1909? A. Yes, sir.

"Q. Some time in the month of December, 1909, was it? A. I wouldn't like to swear to that, sir.

"Q. Now, you went into the office of Christian Brinkop. What occurred in that office at that time? A. Walter told me they wanted a new stub made out.

"Q. Did you have a conversation with Christian Brinkop at that time at that place? A. Yes, sir.

"Q. What was the conversation?

(Interruption by objection.)

"Q. Now, go ahead, Mr. Cook, and state what

took place there? A. You mean, what was said to me?

"The Commissioner: What was said to you by Christian Brinkop in regard to this assessment? A. Well, the son did most of the talking.

"Q. Did Walter Brinkop speak to you regarding this assessment against Mr. Scullin in Christian Brinkop's presence? A. Yes, sir.

"Q. Now, Mr. Cook, will you please state what occurred, the conversation between Walter Brinkop, yourself and Christian Brinkop at that time and at that place regarding the assessment of Mr. John Scullin for 1910? A. Well, Walter told me to make out a stub for \$500,000.

"Q. Then what occurred, Mr. Cook? A. I did that. Mr. Brinkop said, 'You sign that, Mr. Cook. I will be responsible.'

"Q. Now what did you write on that stub, Mr. Cook? A. '\$500,000.'

"Q. Do you recall whether that was in lead pencil or ink? A. Lead pencil.

"Q. Did you put a bracket on that stub? A. No, sir.

"Q. When you went into Mr. Christian Brinkop's private office did you see your original stub? A. No, sir, I saw that before.

"Q. Well, before you went in there did you see your original stub? A. Yes, sir.

"Q. Who had it, Mr. Cook? A. One of the clerks.

"Q. Will you please state his name? A. Mr. Boediker.

"Q. You saw your original stub? A. Yes, sir.

"Q. Was it in the same condition as when you returned it to the office? A. Yes, sir; any more than '90' was written over the '50.'

"Q. \$50,000? A. Yes, sir.

"Q. There had been no other change on that stub? A. No.

"Q. Mr. Cook, did you make any other assessment for taxation for the year 1910 against Mr. John Scullin than the stub you returned, \$50,000 and \$10,000? A. Only what I was requested to make, the \$500,000 that I was requested to make.

"Q. Who told you, Mr. Cook, to write the \$500,000 on the stub? A. Walter Brinkop.

"Q. Was Mr. Christian Brinkop present when that was said? A. Yes, sir.

"Q. What did he say? A. He just told me to sign it.

"Q. Who? A. Christian Brinkop. He says, 'You sign it, I will be responsible.' Said I, 'All right.' "

Mr. Christian Brinkop gives this account of the transaction:

"Q. Do you know whether Mr. Cook as assessor of that district had made a return prior to December of 1909, reporting the value of Mr. Scullin's personal property? A. Yes, sir.

"Q. Where had that assessment been filed? A. In the assessor's office.

"Q. In the assessor's office? A. Yes, sir.

"Q. Was your attention called to that after it had been filed? A. To the best of my recollection it was.

"Q. Who called it to your attention? A. I guess myself, personally. I investigated it.

"Q. How did you happen to examine the return for Mr. Scullin's assessment that had been filed by Mr. Cook? A. I examined a great many of them and among them was Mr. Scullin's.

"Q. Have you any distinct recollection as to having examined Mr. Scullin's return? A. Not particularly. Not anything more than examining a great many others.

"Q. You do remember particularly that you examined the return made by Mr. Cook—. A. Yes, sir.

"Q. And on file in your office? A. Yes, sir.

"Q. And do you know what that return was, the amount returned? A. Well, the return that he made was \$60,000.

"Q. It was \$60,000? A. Yes, sir.

"Q. And your attention was called to that return? A. Yes, sir.

"Q. Who called your attention to the return? A. I say, in looking over so many of them it came to my attention. . . .

"Q. Now, when you found this return made by Mr. Cook assessing Mr. Scullin's property at \$60,000, what did you do in respect of it, if anything? A. Well, I just made a memorandum and took it up with Mr. Cook and told him that I thought that was a very small assessment for such a wealthy man like Mr. Scullin who has never made any returns.

"Q. You made a memorandum? A. Yes, sir.

"Q. What sort of a memorandum? A. Just a little memorandum for myself, so that I could speak to Mr. Cook about it.

"Q. Was that a written memorandum? A. That was my own private memorandum.

"Q. I asked was it a written memorandum? A. It was certainly written with lead pencil, yes, sir.

"Q. What has become of that memorandum? A. That went in the waste basket after I talked to Mr. Cook, of course. You might know that. . . .

"Q. You made a memorandum of this particular case? A. Yes, sir.

"Q. Then after you saw Mr. Cook you destroyed that memorandum? A. After I talked it over with Mr. Cook, it wasn't necessary for me to put it in a file any more.

"Q. What became of the original return of Mr. Cook? A. That I don't know anything about.

"Q. Was that thrown into the waste basket also? A. I don't know, sir. I don't know anything about that.

"Q. Where was it when you last saw it? A. In the Assessor's office.

"Q. In whose hands? A. In my hands.

"Q. The last time, then, you saw the original return made by Mr. Cook of the assessment of Mr. Scullin's property, it was in your hands? A. Yes, sir, the original figure.

"Q. And in your private office? A. In the private office, yes, sir.

"Q. What did you do with it? A. I put it back again.

"Q. Put it back again where? A. Back in the file, yes, sir.

"Q. Where did you put it back? A. Back into the file.

"Q. In which file? A. In one of the cases where we had all the different stubs of assessments.

"Q. Who had charge of the files? A. I had, and of course all the clerk's in the Assessor's office.

"Q. Well, did you make any substitute for that? A. Mr. Cook made a substitute.

"Q. Did you direct him to make it? A. I advised him to make it.

"Q. What did you say to him about it? A. I said, 'Mr. Cook, Mr. Scullin is a very wealthy man and I am surprised you have him down for only \$60,000.' He said, 'Yes, Mr. Binkop, I know, but I don't know just exactly what the man has. I have been serving him with notice for I guess eighteen years and he never has paid any attention to it. I know he is a rich man.' I said, 'Well, I have something to show he is worth nothing less than five hundred thousand

dollars in personal property.' He said, 'Yes, I guess that is right, Mr. Brinkop, but I have no way of telling it.' I said, 'I would advise you, Mr. Cook, to make that \$500,000.'

"Q. You told him you had something there to show he was worth \$500,000? A. I did.

"Q. What did you have there to show he was worth \$500,000? A. I had a report.

"Q. What report? A. A report of the man what he was possessed of. Like you get a report when you sell a man goods.

"Q. Now, what report did you have? A. Well, what report? I got a report of the man.

"Q. Was it in writing? A. It was in printing.

"Q. In printing? A. In typewriting, I really mean.

"Q. In typewriting? A. Yes, sir.

"Q. Who made the report? A. That I forget now, I can't remember.

"Q. What became of the report? A. That was destroyed afterwards.

"Q. Who destroyed that? A. I don't know. I couldn't remember if I destroyed it or whom.

"Q. Was it in your possession? A. It was.

"Q. Why do you think it was destroyed? A. That is the best of my recollection. . . .

"Q. Who made the report to you? A. I don't remember that.

"Q. Who? A. I can't remember that.

"Q. Was it somebody you employed? A. No, sir.

"Q. Was it signed by anybody? A. It was signed by the people that I got it from at the time.

"Q. What people did you get it from? A. I don't remember that.

"Q. Well, was it several people or one person

that you got it from? A. Oh, there was a whole lot of them.

“Q. Was it a stranger who made this report to you or one with whom you were acquainted? A. Yes, he was a stranger to me as far as myself is concerned.”

Defendant at the close of the plaintiff's case and the whole case, offered instructions in the nature of a demurrer to the evidence, which the court refused.

The court, at the instance of the respondent, gave to the jury seven instructions, and refused five asked by appellant.

I. No fair-minded, disinterested person can read this record and come to any other conclusion save that Christian Brinkop and his son Walter, in fact, made the assessment in controversy, and that the assessor, Mr. Cook, whose duty it was to make it, had nothing whatever to do with it except to write down just what Brinkop and his son ordered him to do.

It is also disclosed by this record that Mr. Cook had no knowledge or information of his own as to what property the appellant owned over and above that at which he assessed it, \$60,000, or its value, and so stated those facts to Brinkop. Thereupon the latter ordered Mr. Cook to make out a new assessment for the sum of \$500,000, and that he Brinkop, would be responsible for it, which, upon that assurance, Mr. Cook made, and thereupon the old assessment or stub was destroyed, but by whom, is not made perfectly clear by the evidence.

There is no merit whatever in the suggestion that Brinkop had investigated what property the appellant owned, that he reported that fact to Mr. Cook and that the latter made the second or \$500,000 assessment upon the information furnished by Brinkop.

Both Brinkop and Cook testify that the latter stated to the former the reason why he fixed the first

assessment at \$60,000, was because he had no knowledge or information of any other property owned by appellant; and thereupon Brinkop ordered Cook to make the second assessment at \$500,000, and stated that some other person whom he could not name reported to him that appellant owned \$500,000 worth of property, and for that reason ordered Mr. Cook to make the \$500,000 assessment.

Of course, according to this testimony, Brinkop had no personal knowledge of what property Scullin owned. He was acting purely upon hearsay statements, not under oath, and could not name the party who had so informed him of appellant's property: nor does the record anywhere disclose the fact that Brinkop's informant had any such knowledge.

Such conduct and acts on the part of Brinkop and Cook do not arise to even the semblance of an assessment, which will appear from the authorities to be presently cited.

It was simply a bold, bald piece of usurpation of authority on the part of the former, without law or morality to support it.

The assessment should have been made by Cook and not by Brinkop and his son. This is made clear by the following authorities: Sections 11352, 11353 and 11518, Revised Statutes 1909; City Charter of St. Louis, art. 5, secs. 16 and 18; State ex rel. v. Alt, 224 Mo. 493; State ex rel. v. Dillon, 87 Mo. 487; Western Ranches v. Custer County, 28 Mont. 278; Matador Land & Cattle Co. v. Custer County, 28 Mont. 286; Rich Hill Mining Co. v. Neptune, 19 Mo. App. 1. c. 442.

Moreover, the doubling of the illegal \$500,000 assessment was also a bold piece of usurpation of authority by Brinkop, and was equally as illegal as was the assessment itself.

The doubling of an assessment is not made automatically by the law, as was done in this case "in the office," but must be made by the assessor. [Sec. 11353, R. S. 1909.]

And this statute further provides that if the assessor shall neglect or refuse to perform that duty, then he "shall be liable in each case to a penalty of fifty dollars," etc.

Under this view of the case we are of the opinion that the second or the \$500,000 assessment is an absolute nullity; and that the judgment should be reversed and the cause remanded to the circuit court with directions to dismiss the suit; and it is so ordered. This, however, is without prejudice as to the original assessment made. All concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY, Appellant, v. PUBLIC SERVICE
COMMISSION.

In Banc, December 22, 1915.

1. **PUBLIC SERVICE COMMISSION: Findings As to Necessity of Interchange Railroad Track.** The finding of the Public Service Commission that the evidence discloses such a pressing public demand or necessity for the construction of an interchange track by two railroads at the point where their lines cross each other as to warrant the expenditure of the amount of money which the evidence shows the track will cost, are not final and conclusive upon the courts authorized to review its actions.
2. ———: **Limitations Upon Powers.** The origin and powers of the Public Service Commission are purely statutory, and it has no authority save that given it by express statute, and save such implied authority as may be necessary to carry into effect the authority expressly given.
3. ———: **Evidence and Procedure.** The evidence in any case appealed from the Public Service Commission is required to be preserved and transferred to the circuit court, and that court

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determines the case on that evidence; and on appeal from the circuit court, the full substance, if not the entire evidence, must be brought to the Supreme Court, and this court determines the propriety of the judgment of the circuit court upon that evidence, as in an equity proceeding, by a trial *de novo*, and will direct the circuit court to affirm or reverse the judgment of the commission, but not to modify it, nor will it direct the dismissal of the proceedings, since its jurisdiction is derivative.

4. ———: Interchange Railroad Track: Unreasonable Burden. A connecting or interchange track between two railroads whose lines cross each other (one thirty-five feet above the other's track) is not a facility included within the absolute duties of a railway company; and where the evidence clearly shows that the cost of constructing such interchange track will be very large and the cost of maintaining it will far exceed all probable income to the railroad companies from operating it, and there is no demonstrated public necessity for its construction, as shown by the evidence and the small amount of previous shipments, the judgment of the circuit court affirming the judgment of the Public Service Commission ordering it to be constructed, will be reversed.
5. ———: ———: ———: Costs. The question of the expense of constructing and maintaining such a track is of great importance in determining whether the judgment of the commission imposes an unjust burden upon the railroad companies.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*, Judge.

REVERSED AND REMANDED (*with directions*).

O. M. Spencer, H. J. Nelson and M. G. Roberts for appellant.

Under the evidence in this case as to the places and persons interested, the volume of business to be affected, the amount of public demand and necessity as against the conceded tremendous cost of erecting and maintaining this interchange track, the order of the Public Service Commission was arbitrary, unreasonable, unsupported by any substantial evidence showing a public demand and necessity and was such as to deprive the appellant of its property without due process of law in violation of the Constitutions

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of Missouri and the United States. *State of Washington ex rel. v. Fairchild*, 224 U. S. 510. The proposed interchange track is not a facility included within the absolute duties of a carrier and the question of expense is of controlling importance. *State ex rel. v. Fairchild*, 224 U. S. 529.

Wm. G. Busby and *George N. Davis* for respondents.

The commission's findings are in effect conclusive, and the scope of review thereof by the courts is limited under the provisions of the Public Service Commission Act. It is universally held that in reviewing the orders of the Interstate Commerce Commission, in interstate cases, and of the State Commissions, in State cases, the courts treat the orders of the commission as in effect conclusive, and the same rule should be laid down by this court for Missouri. *State v. Public Service Commission*, 137 Pac. 136; *Electric Ry. v. Commission*, 117 Pac. 748; *State ex rel. v. Public Service Commission*, 142 Pac. 684; *Railroad v. Railroad Commission*, 140 N. W. 298; *Railroad Commissioners v. Railroad*, 80 Pac. 53; 33 Cyc. 52; *Morgan Co. v. Railroad Comm.*, 33 So. 220; *In re Citizens of Brook Park*, 144 N. W. 771; *State ex rel. v. Railroad*, 144 N. W. 156; *Reagan v. Loan & Trust Co.*, 154 U. S. 362.

WOODSON, C. J.—This suit regards the legality of certain proceedings to be presently mentioned, had to compel the appellants, the Chicago, Burlington & Quincy Railroad Company and the Wabash Railroad Company, to construct and maintain an interchange track or switch between their respective main lines of roads at Macon, Missouri.

Briefly stated, the facts of the case are: The Hon. C. H. Payson, the mayor of the city of Macon,

on November 18, 1913, under the Public Service Commission Act, filed a petition with the respondent, the Public Service Commission, to require the Burlington and the Wabash Railroad companies to construct and maintain an interchange track between their main lines at Macon, for the purpose of transferring cars from one road to the other.

The cause was set down for hearing and all parties were duly notified of the time and place of hearing. After the issues had been joined the parties appeared, introduced their evidence and after due consideration the commission granted the petition, and made an order upon the railroad companies to construct and maintain said track.

As I understand the record, the Burlington Company, alone, by writ of *certiorari*, had the cause transferred to the circuit court of Cole County for review. The cause was there heard by the court, as provided for by said act; and after due consideration the order of the commission ordering the construction and maintenance of the track was affirmed.

In due time and in proper form the Burlington Company, alone, appealed the cause to this court.

Formal parts omitted, the petition filed by the complainant was as follows:

“That the line of railroad of the Wabash Railroad Company crosses the line of railroad of the Chicago, Burlington & Quincy Railroad Company at Macon, Missouri; that there is no switch connection or interchange track at or near the point of intersection of the line of the Wabash Railroad Company with the line of the Chicago, Burlington & Quincy Railroad Company at Macon, Missouri; that the reasonable service of the public and in order that the freight might be handled for the proper accommodation of shippers on said railroads and the citizens of Macon, it is necessary that switch connection or an interchange track between said lines of railroad be constructed and

maintained by such railroad corporations at Macon, Missouri, to the end that property may be carried without a change of cars, and that property may be carried by a more direct and shorter route; that such interchange track or switch connection is reasonably necessary for the accommodation of the public of the city of Macon. Wherefore, complainant prays that the commission order and require that the defendants construct and maintain a switch connection or interchange track between their said lines of railroad at Macon, Missouri, and require the defendants to receive from each other and to transport for each other, cars over each other's tracks by way of such switch connection or interchange track, and for such other and further relief as to the commission may seem just and proper."

The answer of the Chicago, Burlington & Quincy Railroad Company, omitting formal parts, is as follows:

"Further answering and as a further defense, this defendant says that at the point where the track of said Wabash Railroad Company crosses that of this defendant, the said track of said Wabash Railroad Company is thirty-two feet above the track of this company; that the construction of a connecting track is impracticable and wholly unnecessary; that the expenses of constructing any such track would be enormous and such a track as would be a dangerous thing, and that the traffic which could possibly be interchanged between the two companies at that point would be wholly insignificant in volume; that the demand of the complainant is wholly unreasonable and not made in good faith, but for the purpose of attempting to coerce this defendant into doing other things that the said city of Macon is demanding of it; that the public service does not demand the construction or maintenance of any such connecting track as is demanded by plaintiff, and that any such connecting

track would be wholly useless and of no substantial benefit to anyone whomsoever.

“Further answering and as a further defense, this defendant says there is no valid law purporting to require this defendant to so construct or join in the construction of such a connecting link as is demanded by complainant, and that if there be any law purporting to require or purporting to authorize this Honorable Commission to require this defendant to so construct or join in the construction of such connecting track, then the said law is unconstitutional and void under the provisions of the Constitutions of the United States and the State of Missouri, in that the same would deprive this defendant of equal protection under the law and deprive it of its property without due process of law, and void for the further reason that it would require this defendant to do various things which it has no lawful right or power to do, such as the acquirement of property of other persons, the occupancy of public streets and the interference of access with abutting owners upon public streets, the power to do which this commission cannot confer upon this defendant. Wherefore, having fully answered, defendant asks to be discharged with its costs.”

The commission in its findings stated the character and cost of the improvement in this language:

“Speaking roughly, the proposed track would connect with the Burlington about 1050 feet east of the crossing, and with the Wabash about the same distance south of the crossing, the length of the track from one road to the other being about 1500 feet. An additional length of from 400 to 600 feet paralleling the Wabash was recommended in order to secure a safe place for the storage of cars awaiting transfer. The difference in elevation between the points of connection with the two lines is about thirty-five feet and the track would have a 2.5 per cent grade, with a 6 degree curve. In

order to come to the lower grade of the Burlington, a deep cut and the removal of about 16,000 cubic yards of earth is made necessary, and that is the large item of expense, as shown by all of the estimates and testimony. The total cost of the improvement as estimated by the Burlington engineer is the sum of \$15,708, and of the engineers of the Public Service Commission the sum of \$13,028. The city engineer, without having considered the matter in detail, gave an off-hand estimate of from \$4000 to \$6000. The engineer of the Burlington added \$12,250 as damages to the Wabash Company for the land used for right of way purposes. Mr. Sparrow testified that, in his opinion, by using the route of the former connecting switch, the cost could be reduced \$6000, from his estimate, but that on account of the heavier grade and shorter curve an engine could not haul more than 140 tons, or two carloads of coal, and that such construction would not be advisable if the interchange traffic would exceed two cars per day. The annual cost of maintenance was estimated at about \$500. The cost of the improvement can be more definitely ascertained, and in this case there is little difference in the estimates of the engineers who carefully considered the subject. From their testimony we find that the sum of \$13,000 should cover the reasonable cost of the track, and \$500 per year a liberal allowance for keeping it in repair. We have made no allowance for the value of the land necessary for the right of way, for the reason that it is owned by the companies and is useful only for railroad purposes, although we think the quantity contributed by each company would be a proper matter for consideration in apportioning the cost of the work."

The abstracts of the records, as might naturally be expected, from the statement made of the case, are voluminous, covering almost four hundred printed pages, and for that reason alone it would be out of the question to state even the substance of the evidence.

All we can hope to do is to state the ultimate facts which the evidence tended to establish.

I. The principal question presented by this record for respondents is, does the evidence preserved disclose such a pressing public demand or necessity for the construction of the interchange track mentioned as to warrant the expenditure of the large sum of money the evidence shows would be required to accomplish that purpose?

At the very threshold of the case we are met with the contention of counsel for respondents to the effect that the findings of the commission, under the act of its creation, are final and conclusive upon this and other courts of the State, which might be called upon to review its actions.

We are not able to lend our concurrence to that contention. The origin and powers of the commission are purely statutory, and it has no authority save that which is given to it by the express provisions of the act, and such implied authority as may be necessary for it to exercise in order to carry into effect that which is expressly given.

And upon the other hand, the scope, force, effect and the limitations of the acts and rulings of the commission must be sought for in the same act of the Legislature.

The act of the Legislature provides that the commission shall preserve all of the maps, plats, letters, documents and other evidence introduced at the trial of a cause; and that upon the transfer of the cause to the circuit court for review, it shall transmit the same, with the record of the case to said court.

And section 111 of the act in express terms provides that when the cause reaches the circuit court it shall hear it "on the evidence and exhibits introduced before the commission," at the trial of the cause be-

fore it, and that the "same shall be tried and determined," by the circuit court, "as suits in equity;" and section 114 of the act relating to appeals to this court provides that "the original transcript of the record and testimony and exhibits, certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the Supreme Court."

This language is plain and unambiguous, and there is no room left for misunderstanding its meaning.

Every court and jurist of the State thoroughly understands how a cause in chancery is tried and determined. If not the entire, the full substance of the entire evidence must be brought to this court; and while we will defer somewhat to the findings of fact made by the trial court, yet we are not arbitrarily bound thereby.

The trial in this court is practically *de novo*, and after due consideration given to all the evidence the court will accept, modify or reject the findings of the circuit court and make such findings as the law and evidence may warrant. [Gibbs v. Haughwout, 207 Mo. 384, l. c. 391.]

The same is true of the findings of the commission in this class of cases.

This court, under the plain mandate of the statute quoted will consider the entire record, and give to the findings of the commission such weight and consideration as we may deem them entitled to under the law and evidence.

We are, therefore, clearly of the opinion that this contention of counsel for the respondent is not well founded, and the same is ruled against them.

II. This brings us to the consideration of the original proposition previously stated.

In order to have the proposition clearly before our minds, I will restate it in the language of counsel for appellant:

“Under the evidence in this case as to the places and persons interested, the volume of business to be affected, the amount of public demand and necessity as against the conceded tremendous cost of erecting and maintaining this interchange track, the order of the Public Service Commission was arbitrary, unreasonable, unsupported by any substantial evidence showing a public demand and necessity, and was such as to deprive the appellant of its property without due process of law in violation of the Constitutions of Missouri and the United States.”

We have made a careful examination of the record in this case and are firmly of the opinion that the evidence preserved therein does not warrant the order made by the Public Service Commission, or the judgment of the circuit court rendered affirming the order of the commission.

Counsel for the respondents concede that the cost of the construction of a connection or passage track will be at least \$13,000, while the evidence for appellant tended to show that it would cost \$15,700, both excluding the damages and cost of the right of way for the passage track, which appellant's evidence tended to show would amount to about \$12,000, while respondents introduced no evidence upon that point. In addition it is practically agreed that the annual cost and expense for maintaining and operating said track will be at least \$500.

The evidence also shows that the Wabash road is thirty-five feet above the Burlington, and that the grade of the track would be about two and a half per cent with a six per cent curve, which would prevent the transfer of more than two cars of freight at a

time, or one hundred and forty tons. It has been suggested that this grade and curve referred to another track, but be that as it may the result would be the same, as it is conceded the annual cost of maintenance and operation would be \$500.

There are no industries whatever on the Wabash road, and but one on the Burlington, and that is the Home Coal Company.

In the year 1913, this company shipped fifty-eight cars of coal out of Macon and only thirteen of them were shipped to competitive points between the two roads.

For the year ending November, 1913, the Burlington road delivered to the Wabash 134 tons of freight in broken lots, and the latter delivered to the former 150 tons.

This is an accurate summary of the evidence showing the amount of business interchanged between the two roads at Macon during that year.

The evidence also shows, that at Chillicothe, a city larger than Macon, and located just west in the second county, where the two roads cross and have interchanging tracks, not a single car of freight was interchanged between the two roads.

The record also discloses that R. A. Guthrie owns a creamery company and ice plant, manufactures butter and ice, etc., amounting to about fifteen or sixteen tons a day during the hot weather. This plant has no connection with either of said roads, and therefore an interchanging track would not serve it in any manner. During the year 1913, the year before this proceeding was begun, it shipped over the Wabash road six or seven cars of ice, only two or three of which were in carload lots.

There was other evidence tending to show that the business of Macon was rapidly increasing and several witnesses testified as to what amount of freight would

be interchanged should the connecting switch be put in. In substance it was as follows:

Fifteen to twenty cars of ice; fifteen to twenty cars of poultry; "a large proportion of the one hundred cars of northern potatoes;" several cars of mules; from three to five hundred cars of coal; from fifty to seventy-five cars of hay.

This latter evidence is largely expert or rather speculative, with no well established facts upon which to base the opinions of the various witnesses who testified thereto. The actual shipments to and from Macon and Chillicothe are not one quarter of the amounts estimated by these speculative witnesses. But for the sake of argument, suppose that the respondents' estimate of the number of cars of freight to be shipped to and from Macon should amount to 500 or even 750, the highest estimate made by anyone, still the question would remain, what percentage of that number would be interchanged at that point between these two roads?

There is no evidence tending to show that fact; but suppose it should be ten times more than it was when this proceeding was instituted, still we would have scarcely two hundred cars; and should the roads charge the legal fee, which I believe is \$2 per car for switching charges, they would collect only \$400 per annum, \$100 less than respondents' concede would be required to keep up and operate the interchanging track. This loss should be added to the interest on the cost of construction, \$13,000, and on the value of the right of way, \$12,000, total, \$25,000, which at six per cent interest would be \$1500, plus the \$100 before mentioned, making a total of \$1600.

But suppose again: That the entire 750 cars should be transferred over the interchanging track, and the switching charges should be \$2 per car, we would then have a gross annual earning of \$1500, and the actual cost to the company would be the \$1500 interest, plus the \$500, actual expense of maintenance

and operation, and an aggregate cost of \$2000. From this should be deducted the \$1500 switching charges which would leave a net loss of \$500 per annum to the appellant.

As previously stated, this evidence wholly fails to satisfy the chancellor that this showing of interchangeable freight would warrant this court in compelling the Burlington Company to lay out and expend the large sums of money the record shows would be required to construct and operate this switch.

Moreover, suppose no interest is allowed upon the value of the right of way, damages, etc., as counsel for respondents contend should not, then how would the matter stand? Six per cent interest on the cost of construction, \$13,000, is \$780, to which should be added the \$500 annual cost for maintaining and operating the switch, which would amount to \$1280, which sum, if deducted from the highest estimate of the switching charges that would be collected, \$1500, we would have a net balance in favor of the company of \$220 per annum.

This result is reached by figuring everything most favorably to the respondents. Even to the highest estimates made by their witnesses; but if we weigh their evidence in the light of the actual facts in the case, we have no hesitancy in saying that there is no substantial evidence in this record which would warrant the chancellor in finding that one-half of the cars estimated by the witnesses for respondents would be transferred over this track, should it be constructed; and instead of there being a profit of \$220 per annum to the company there would be more than that amount of actual loss to it.

Under these facts and circumstances this unjust burden should not be placed upon the appellant.

It must be apparent that the proposed connecting track is not a facility included within the absolute duties of a railway company.

It was held by the Supreme Court of the United States in the case of State of Washington ex rel. Oregon Railroad & Navigation Company v. Fairchild et al., State Railroad Commissioners, 224 U. S. 510, that the question of expenses of constructing and maintaining such a track is of vital, if not of controlling importance.

I am therefore clearly of the opinion that the judgment of the circuit court should be reversed and the cause remanded with directions to dismiss the proceedings.

All concur, *Bond, J.*, and *Blair, J.*, in paragraph one and the result; *Revelle, J.*, not sitting.

ON MOTION FOR REHEARING.

PER CURIAM.—It is urged that we were in error in holding that we would not be bound by the findings of fact made by the commission in this case. The original opinion holds these cases must be heard as cases in equity. From that opinion we do not desire to depart. The act says that they shall be so heard. That means that we will consider the evidence *de novo*. In equitable procedure this court is not bound by the findings of fact made by the chancellor *nisi*. We may yield to the judgment of the commission on the facts (if the circumstances of the cause so appeal to us) as we may yield to the judgment of the chancellor *nisi* in equity, upon the facts, but not otherwise. There is no substance therefore in this ground of the motion for rehearing.

It is urged further, however, that we erred in directing a dismissal of the proceeding, and in this we think there was error, but not such as to justify a rehearing. Under the act our jurisdiction is derivative. Under the act the circuit court has no power to go further by its judgment than to affirm or reverse the judgment of the commission. We should not have

given any direction to the commission as to dismissing the petition. That is a matter left by the law to them. Let the opinion be thus modified, and the motion for rehearing overruled.

All concur except *Woodson, C. J.*, who is of opinion that the judgment first directed is a correct one. Let the motion be overruled, and the judgment entered here that the judgment of the circuit court be reversed and the cause remanded with directions to enter a judgment reversing the order of the commission.

THE STATE ex rel. ELIZABETH C. KNISELY,
Administratrix of Estate of CHARLES H.
KNISELY, v. CHARLES W. HOLTCAMP,
Judge of Probate Court.

In Banc, December 22, 1915.

1. **ADMINISTRATION: Probate Courts: Concurrent Jurisdiction: To Establish Demands.** Section 34 of article 6 of the Constitution, providing for the establishment of probate courts and defining the bounds of their jurisdiction, did not vest in such courts exclusive jurisdiction, but only concurrent jurisdiction with other courts of record, to entertain suits against administrators for the establishment of demands against estates. And section 197, Revised Statutes 1909, in terms certain, authorizes the establishment of such demands in the circuit court.
2. ———: **Purpose: Dissolution.** The estate of a deceased person is a distinct legal entity, and is held in trust and reserved by law primarily for the payment of decedent's debts, and its existence is not dissolved until its demise comes in the orderly and peaceable way ordained by statute. And it is not dissolved, nor does jurisdiction over it cease, so long as a demand, timely begun, is pending in the circuit court undetermined, or if determined, is unpaid out of existing assets.
3. ———: **Establishing Demands in Circuit Court: Exhibition.** The due service of the summons upon the administrator, in an action begun in the circuit court within the time specified by statute after the issuance of letters of administration, is an exhibition of the demand sued on against the estate; and by the filing of the action and service of summons within such statutory period, the circuit court acquires jurisdiction (1) of

the subject-matter, or demand, (2) of the person of the legal representative of the estate, and (3) of the estate, in so far as the demand and the right to have it determined are concerned.

4. ———: ———: ———: **Ousting Jurisdiction.** And jurisdiction of the circuit court having lawfully attached can be ousted or divested only by statutes clearly so providing.
5. ———: ———: **Final Settlement in Probate Court: Action Still Pending in Circuit Court.** The probate court is without jurisdiction to order the administrator to make final settlement of the estate so long as an action on a demand, timely brought, in which service of summons was timely obtained, is pending undecided in the circuit court, or on appeal to an appellate court; and a final settlement, made two years after notice of administration given, and approved by the probate court, and an order directing distribution and discharging the administrator, made while such suit is still pending in either the circuit or appellate court, are likewise void, nor can the payment of a claim established by the action in the circuit court be defeated by the prior approved final settlement and discharge.
6. ———: ———: ———: ———: **Estate Not Fully Administered: Jurisdiction.** The probate court has no jurisdiction to determine the liability of the estate upon a demand made the basis of an action timely and properly brought in the circuit court against the administrator, and until the estate's liability thereon is determined the estate is not fully administered, and the probate court has no jurisdiction to determine the estate is fully administered until its liability upon that demand is determined.
7. ———: **Final Settlement: When to be Made: When an Annual Settlement.** A final settlement, when lawfully made, destroys the estate as an entirety and ends all powers as such of its legal representative; its substance is distributed and its demise is complete. But the statute fixes no definite time when the estate shall be finally settled, but names a condition by which the time may be determined, and that condition is that the estate has been fully administered. A purported final settlement, made before the estate has been fully administered (for instance, while a suit against the administrator to establish a demand against the estate is still pending in the circuit or appellate court), has only the effect of an annual settlement, and beyond that is absolutely void.
8. ———: ———: **Administrator De Bonis Non.** After final settlement an administrator *de bonis non* can be appointed only upon the discovery of unadministered assets, and then only when there are unpaid allowed demands against the estate. But there is no need of an administrator *de bonis non* where

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the purported final settlement was unlawful, for that it was made before the estate was finally administered. In such case the purported final settlement, though approved by the probate court, is in legal effect an annual settlement, and the administrator continues to be its legal representative, unless removed upon some other statutory ground.

9. ———: ———: **Collateral Attack.** Full administration of the estate must really exist, regardless of the probate court's decision thereon, else a settlement, as a final one, is void, and subject to collateral attack.
10. ———: ———: ———: **Demands Pending in Any Court.** The probate court is without jurisdictional power to approve a final settlement as long as in fact demands are legally pending and undisposed of, either in the probate court or other courts of record, and there are available assets for their satisfaction.
11. ———: ———: **Unlawful: Discharge of Administrator.** If the purported final settlement, approved by the probate court, was unlawful, for that the estate had not been fully administered, there being demands legally pending and assets out of which they may be satisfied, and is for that reason to be considered in legal effect an annual settlement, the administrator is at all times after such purported final settlement the legal representative of the estate, unless previously lawfully and finally discharged on other grounds, and the estate is bound by all valid judgments in cases timely brought against him in any court of record in which he was duly served.
12. ———: **Judgment: Refused Classification: Mandamus: Proper Remedy.** Where a probate court has refused to hear a matter over which it has jurisdiction, on the ground that it had no such jurisdiction, this court will issue its writ of mandamus to compel it to proceed. So that where the Supreme Court reversed a judgment of the circuit court in a suit brought against the administrator of an estate, and directed judgment against him in a definite amount, and the circuit court in compliance with that direction entered judgment and directed certification thereof be made to the probate court, and that court refused to act in the matter on the ground that the administrator had long previously made final settlement, which had been approved, and had been discharged, mandamus is the proper remedy to compel the probate court to classify the demand and proceed in the matter, because, if for no other reason, it is a proper method to compel the carrying out and giving effect to the judgment which the Supreme Court directed and commanded; and because (BOND, J., concurring) there was no necessity for plaintiff to resort to other modes of redress, which might be applicable except for the conclusiveness of that judgment.

Mandamus.**WRIT GRANTED.**

E. P. Johnson, Edward C. Crow and Morton Jordan for relator.

(1) The decision of the Supreme Court and the judgment of the circuit court entered in pursuance of the mandate of the Supreme Court legally established petitioner's demand against the Leathe estate, and also declared the right of petitioner to the classification of her judgment in the fifth class. *Knisely v. Leathe*, 178 S. W. 453; *Knisely v. Leathe*, 256 Mo. 363; R. S. 1899, secs. 190, 208. The statutory duty of the respondent to entertain the application of petitioner and to classify her judgment was imperative and clear and the refusal of respondent denied to the petitioner a clear statutory right. *Wense v. McPike*, 100 Mo. 534. Where, upon an application to a court the facts are undisputed, and the principles of law relating thereto are clearly settled and well defined either by statute or common law the granting of the application is not a matter of discretion with the court, but a duty, and the applicant has a legal right to a decision conforming to the said principles of law. *State ex rel. v. Albin*, 44 Mo. 347; *State ex rel. Bayha v. Philips*, 97 Mo. 331; *State ex rel. v. Johnson*, 51 L. R. A. 66; *People ex rel. v. Superior Court*, 5 Wend. 114. The duty devolving upon respondent upon the presentation of petitioner's judgment in this case was not discretionary in character, but it was imperative, specific and defined by Sec. 208, R. S. 1899, requiring the probate courts to determine the class of such judgments when filed, and petitioner is entitled to a peremptory mandamus in this cause commanding the classification of said judgment in the fifth class. *State v. Albin*, 44 Mo. 347; *State v. Meier*, 143 Mo. 447; *State v. Berg*, 76

Mo. 142; State v. Hudson, 226 Mo. 265; State v. County Court, 41 Mo. 221; State v. Bourne, 151 Mo. App. 104; 19 Am. & Eng. Ency. of Law (2 Ed.), 740f; High on Extraordinary Legal Remedies, sec. 534; Wense v. McPike, 100 Mo. 487. (2) The probate court did not have jurisdiction to make a final settlement of the Leathe estate while the relator's suit to establish a claim against said estate was pending and being litigated in the circuit and Supreme Courts, because the statute provides as a condition precedent that before jurisdiction of probate court to make a final settlement can attach the estate must be fully administered, and it could not be fully administered while the claim of petitioner against said estate remained in litigation unadjusted and unsatisfied. R. S. 1899, sec. 233; Ryans v. Boogher, 169 Mo. 685; Smiley v. Cockrell, 92 Mo. 111. It has been expressly decided in this State that section 34 of article 6 of the Constitution does not give the probate courts exclusive jurisdiction in the first instance of demands against estates under administration. Richardson v. Palmer, 24 Mo. App. 480; State ex rel. v. Tittman, 103 Mo. 566; Matson & May v. Pearson, 121 Mo. App. 134. The circuit court has concurrent jurisdiction with the probate court for the adjudication of demands against an estate. State ex rel. v. Tittman, 103 Mo. 553; Richardson v. Palmer, 24 Mo. App. 480. The rule of law is that where two courts have jurisdiction, the court that first acquires jurisdiction, its power being adequate, retains it, and may dispose of the whole controversy. 11 Cyc. 987; State ex rel. v. Reynolds, 209 Mo. 163. (3) Under the foregoing authorities and Sec. 233, R. S. 1899, the estate not having been fully administered, a final settlement of it could not be made and the executrix discharged, as proceedings by a court without authority of law are null and void. State v. Clark County, 44 Mo. 51; State v. Lafayette County, 41 Mo. 545; State

v. Churchill, 41 Mo. 41. (4) A probate court cannot divest itself of jurisdiction over an estate or an executor or administrator by deciding a settlement is final as to a matter not included in the settlement. 2 Woerner's Law of Administration, p. 1128, sec. 506. (5) The making of the pretended final settlement while relator's suit against the Leathe estate was pending was a fraud upon the probate court that renders it void as a final settlement. Smiley v. Cockrell, 92 Mo. 109; Lenox v. Harrison, 88 Mo. 491. (6) Final settlements of estates made in violation of or not in conformity to law are invalid and have the effect only of annual settlements. Lenox v. Harrison, 88 Mo. 491; Mead v. Bakewell, 8 Mo. App. 553; Van Liew v. Barrett & Co., 144 Mo. 515; Brashears v. Hicklin, 54 Mo. 102; May v. May, 189 Mo. 502. No notice to the executrix of the Leathe estate was required to be given before presenting relator's judgment to the probate court. Wernse v. McPike, 100 Mo. 487; Stephens v. Bernays, 119 Mo. 146. (7) Sales made by Grace A. Leathe as devisee of Samuel H. Leathe of valuable real estate after the pretended final settlement does not deprive relator of her right to enforce her judgment against said real estate. Rogers v. Johnson, 125 Mo. 216; Aubuchon v. Aubuchon, 133 Mo. 265; Moody v. Peyton, 135 Mo. 490; Higbee v. Bank, 244 Mo. 424; Brown v. Marshall, 241 Mo. 750; Shaw v. Nicholay, 30 Mo. 107; Metcalf v. Smith, 40 Mo. 576; Wright v. Green, 239 Mo. 454; Armor v. Lewis, 252 Mo. 576; Lewis v. Carson, 93 Mo. 591; Carson v. Walker, 16 Mo. 87; Ferguson v. Carson, 9 Mo. App. 497; Lemon v. Lincoln, 68 Mo. App. 80.

Frank H. Sullivan, Manton Davis, George W. Lubke and George W. Lubke, Jr., for respondent.

(1) The judgment of the probate court approving the final settlement, discharging the executrix and clos-

ing the estate is a final judgment of a court of competent jurisdiction, not subject to collateral attack. Clyce v. Anderson, 49 Mo. 40; McLean v. Bergner, 80 Mo. 418; Robards v. Lamb, 89 Mo. 310; Smith v. Hauger, 150 Mo. 444; Ratliff v. Magee, 165 Mo. 469; Woodworth v. Woodworth, 70 Mo. 601; State to use v. Roland, 23 Mo. 95; State ex rel. v. Gray, 106 Mo. 526; Pearson v. Murray, 230 Mo. 162; State ex rel. v. Carroll, 101 Mo. App. 110; Michie v. Grainger, 149 Mo. App. 301; Goodman v. Griffith, 155 Mo. App. 574; Mueller v. Grunker, 145 Mo. App. 611. (2) A probate court may remove a personal representative and appoint a successor, or make final settlement "if it appear to the court that the estate has been fully administered." R. S. 1909, secs. 10, 38, 47, 48, 49, 50, 54 and 239. (3) The powers of a personal representative are drawn exclusively from the appointment of the probate court. Staggs v. Green, 47 Mo. 501. (4) The judgment of the probate court discharging the executrix, and closing the estate, put an end to her powers longer to appear for the estate in the case of Knisely v. Leathe, and the judgment in that case having been rendered without a revivor against a successor is voidable. Taylor v. Savage, 1 How. (U. S.) 286; Buckingham v. Owen, 6 Smedes & M. (Miss.) 505; Wiggin v. Plumer, 31 N. H. 366; Groce v. Field, 13 Ga. 24; Weddington v. Huey, 80 Ga. 651; Bank v. Stanton, 116 Mass. 436; More v. Miller, 53 Pac. (Cal.) 1078, 59 Pac. (Cal.) 823; Childs v. De la Veago, 89 Pac. 83; Bank v. De la Veago, 89 Pac. 84; Hayes v. McClear's Admx., 2 Harrington (Del.), 65; Edney v. Bann, 53 Neb. 116; State ex rel. v. Riley, 219 Mo. 681; Ratliff v. Magee, 165 Mo. 469. (5) On writ of error *coram nobis*, brought by some one properly representing the estate or in privity therewith, the judgment should be vacated. Latshaw v. McKees, 50 Mo. 384; Dugan v. Scott, 37 Mo. App. 669. (6) The jurisdiction of this court over Knisely

v. Leathe ended when the mandate went down, except for the single matter of seeing that the directed judgment was entered. State ex rel. v. Broadbush, 234 Mo. 367. (7) Proceedings to review the judgment in Knisely v. Leathe are to be brought before the circuit court and not here. Laffoon v. Fretwell, 24 Mo. App. 258; Ewing v. Winters, 39 W. Va. 490; James v. Railroad, 123 N. C. 302; Putnam v. Clark, 35 N. J. Eq. 149; Galbreath v. Wallrich, 109 Pac. 417. (8) The proceeding in the probate court was a suit on the judgment. McFaul v. Haley, 166 Mo. 68. (9) Mandamus will not lie to direct a judicial officer how he shall act, but only that he do act. State ex rel. v. County Court, 41 Mo. 225; Tranir v. Porter, 45 Mo. 339; State ex rel. v. Court of Appeals, 87 Mo. 376; State ex rel. v. McGown, 89 Mo. 150; State ex rel. v. Smith, 105 Mo. 9; State ex rel. v. McElhinney, 246 Mo. 56; State ex rel. v. Shackelford, 263 Mo. 64. (10) Relator might have appealed to the circuit court and had a full hearing *de novo*. R. S. 1909, sec. 3956, sub. 4; R. S. 1909, sec. 289, sub. 5; R. S. 1909, sec. 296; Scott County v. Leftwich, 145 Mo. 31. (11) Where there is such a remedy by appeal, mandamus will not lie. Dunklin County v. County Court, 23 Mo. 454; Williams v. Court of Common Pleas, 27 Mo. 225; State ex rel. v. County Court, 48 Mo. 478; State ex rel. v. McAuliffe, 48 Mo. 114; State ex rel. v. Lubke, 85 Mo. 339; State ex rel. v. Marshall, 82 Mo. 486; State ex rel. v. McGown, 89 Mo. 158; State ex rel. v. Fort, 180 Mo. 109; State ex rel. v. Thurman, 232 Mo. 163; State ex rel. v. Grimm, 178 S. W. 121. (12) Even an error of an inferior court as to its jurisdiction is reviewable by appeal and hence mandamus will not lie. State ex rel. v. Mosman, 112 Mo. App. 549; State ex rel. v. Thurman, 232 Mo. 163. (13) And the usual delays incident to an appeal do not make that procedure an inadequate remedy. State ex rel. v. Neville, 110 Mo. 349; State ex rel. v. Robinson, 257 Mo.

593. (14) The loss of the right of appeal by failure to exercise it within the time allowed will not justify a writ of mandamus. State ex rel. v. McKee, 150 Mo. 244; State ex rel. v. Thurman, 232 Mo. 164; State ex rel. v. Grimm, 178 S. W. 121.

REVELLE, J.—This cause enters our portals as no stranger. Our acquaintance covers a period of years and extends to all of its ramifications. It has been here twice on appeal and several times on applications for original writs. It seems to possess one quality of Banquo's ghost. It came here first upon a demurrer to the petition, involving principally a question of limitation and the character of the instrument sued upon. [Knisely v. Leathe, 256 Mo. 341.] The cause was reversed and remanded to be retried in accordance with the views there expressed. Upon retrial a verdict for the defendant was returned and plaintiff again appealed. On that appeal (Knisely v. Leathe, 178 S. W. 453) this court reversed the judgment *nisi* and directed a judgment for plaintiff in the sum of \$107,500, with interest thereon at the rate of six per cent per annum from May 17, 1902, said interest being required to be calculated upon the day the circuit court entered the judgment, and be then added to the principal and made a part and parcel of such judgment. In compliance with this order, and on July 2, 1915, the circuit court entered judgment in favor of relator for the aggregate amount of \$192,263.75, and this, in compliance with this court's direction, was certified to the probate court for classification, same being filed and presented in open court on the 14th day of July, 1915. There was also attached to the certified copy of judgment and filed an affidavit of relator stating that she had given credit to the estate involved for all payments and off-sets to which it was entitled, and that the balance claimed on the annexed judgment

was justly due and remained unpaid. Upon formal application to classify said judgment being made, respondent as judge of the probate court declined to classify the judgment or to take cognizance thereof, other than to determine that it had no jurisdiction and made the following order:

“Now at this day, the matter of the application of Elizabeth C. Knisely, administratrix of the estate of Charles H. Knisely, deceased, asking for the classification of a certain judgment for \$192,263.75 in her favor as said administratrix, and against Grace A. Leathe, executrix of the estate of Samuel H. Leathe, deceased, as a debt and claim against the estate of Samuel H. Leathe, deceased, coming on to be heard, and said Elizabeth C. Knisely, administratrix, presenting in court thereof certified copy of said judgment of the circuit court in the city of St. Louis, Missouri, and a certified copy of the mandate of the Supreme Court of Missouri, directing the entry of said judgment for said above-mentioned sum in favor of said Elizabeth C. Knisely, administratrix, and also offering in support thereof the files of the circuit court of the city of St. Louis, showing that the said suit of Elizabeth C. Knisely, administratrix of the estate of Charles H. Knisely, deceased, against Grace A. Leathe, executrix of the estate of Samuel H. Leathe, deceased, was begun on August 1, 1907, and service of process had on Grace A. Leathe, executrix, on September 7, 1907, and the subsequent dismissal of said suit in the absence of counsel for plaintiff therein, and the institution of another suit by said Elizabeth C. Knisely, administratrix, against Grace A. Leathe, executrix of the estate of Samuel H. Leathe, deceased, and which said files last mentioned of said circuit court also show said cause was disposed of by demurrer and motion to strike out plaintiff's petition in the said circuit court in St. Louis, Missouri, resulting in judgment for de-

fendant, followed by appeal to the Supreme Court and reversal by the Supreme Court, and a subsequent trial before a jury in the circuit court of St. Louis, Missouri, resulting in judgment for defendant, followed by appeal to the Supreme Court, where judgment of the circuit court was reversed and the cause remanded with directions to circuit court of city of St. Louis, Missouri, to enter judgment for the plaintiff for the sum of \$107,500, together with interest at six per cent thereon from the 17th day of May, 1902, to the date of the entry of the judgment of circuit court, and said Elizabeth C. Knisely, administratrix, also offered in evidence of the support of said claim the record entries throughout all of the above proceedings in the circuit court of the city of St. Louis, Missouri, as the same appear spread upon the record of the circuit court of said city, and Grace A. Leathe, appearing as distributee, by her counsel, objected to the court entertaining the application for the classification of the said judgment for the reason that on July 7, 1909, as shown by the records of the probate court of the city of St. Louis, Missouri, final settlement of the estate of Samuel H. Leathe, deceased, was made and the executrix, Grace A. Leathe, was discharged, and therefore the probate court of the city of St. Louis had and has no jurisdiction whatever over said estate and no jurisdiction to classify the said judgment and claim, and the court having duly considered said objection, does sustain the same and refuses to entertain the application for the classification, and refuses to act in the matter because of no jurisdiction in the probate court on account of the said final settlement of the estate of Samuel H. Leathe having been heretofore made on the 7th day of July, 1909."

This immediate mandamus proceeding is to compel the probate court to classify the demand in accordance with the judgment and directions of this and the circuit court.

Such other facts as are pertinent to the issue will be stated in the opinion.

I. Article 6, section 22, of our Constitution gives circuit courts exclusive original jurisdiction in all civil cases not otherwise provided for, and such *concurrent* jurisdiction with *inferior* courts as is or may be prescribed by law.

Section 34, article 6, of the Constitution provides for the establishment of probate courts and defines the bounds of their jurisdiction.

The doctrine announced by PHILIPS, P. J., in *Richardson v. Palmer*, 24 Mo. App. 480, that section 34, *supra*, did not vest in the probate court exclusive, but merely concurrent jurisdiction, with other courts of record, to entertain suits against administrators for the establishment of demands against estates, has been uniformly approved and acted upon in this State [*State ex rel. Ziegenhein v. Tittmann*, 103 Mo. l. c. 566-7; *Wernse v. McPike*, 100 Mo. l. c. 486; *Matson & May v. Pearson*, 121 Mo. App. l. c. 134; *Stephens v. Bernays*, 119 Mo. l. c. 147; *Knisely v. Leathe*, 256 Mo. 341.]

Section 197, Revised Statutes 1909, valid by virtue of section 22, *supra*, of the Constitution, in terms certain, authorizes the establishment of such demands in circuit courts. Relator was, therefore, properly within her rights and proceeding in an orderly and legitimate way when she instituted suit in the circuit court to establish her demand against the Leathe estate, then in the process of administration. There is also no doubt that the suit was begun and summons served within one year after the granting of the first letters of administration, and that service was properly had on the person then duly authorized and acting as executrix of the estate. It has heretofore been adjudged by this court (*Knisely v. Leathe*, 256 Mo. 341), and is so written in the statute (Sec. 193, R. S. 1909), that

the service of this summons constituted, within the meaning of the statute, an exhibition of the demand sued upon. The record further establishes that, in obedience to the writ of summons, the executrix duly appeared and entered fully upon a defense in behalf of the estate, and after prolonged litigation a judgment for approximately \$196,000 was rendered. It cannot be gainsaid that by these proceedings all statutory requirements for the establishment of the demand were met, and that the circuit court acquired jurisdiction of (1) the subject-matter, or the demand of relator; (2) the person of the legal representative of the estate, and (3) the estate, in so far as this demand and the right to have it determined were concerned.

What was the purpose of this suit, and the extent and effect of the jurisdiction thus acquired? The purpose of the suit was to finally establish the liability of the estate and relator's right to have it satisfied by the estate and while the estate was a legally existing thing, and the jurisdiction of the circuit was co-extensive with this purpose and right. The estate of a deceased person is a distinct legal entity, and the statute prescribes that it shall remain in existence as such until its demise comes orderly, peacefully and as the law ordains. No mystery surrounds its creation, existence, departure or future. We know whence (and why) it cometh, and whither (and when) it goeth. It comes primarily for the purpose of paying the debts of its former master and to remain until that is done, and when this mission is performed and these labors put to an end, it is ready for dissolution and the law's decree as to the distribution of its dismembered parts. The estate and its legal representative being in the circuit court and within that court's lawful jurisdiction for the *express* purpose of having determined one of the *very* things upon which its right to exist or cease to exist depended, namely: whether it was in debt, by what means could it tear itself from that jurisdiction

and abruptly end its existence? If justification there be for this unusual and peculiar course it must be found in the written law. The jurisdiction of the circuit court, having first and lawfully attached, could be ousted or divested only by statutes *clearly* so providing. [Seibel v. Simeon, 62 Mo. 255; Ryans v. Boogher, 169 Mo. 673; Smiley v. Cockrell, 92 Mo. l. c. 111; State ex rel. v. St. Louis Co. Ct., 38 Mo. 402; State ex rel. v. Reynolds, 209 Mo. 161; 11 Cyc. 987.]

With this in mind, we turn to section 197, Revised Statutes 1909, which authorized the filing of this suit and the establishment of this demand in the circuit court, but search as we have, we fail to find anywhere a provision that after the suit is filed the same shall abate or the jurisdiction of the circuit court divest *whenever* it shall *appear* to the probate judge that all debts have been allowed, or the estate has been fully administered, or the probate court has made such an order. Have we authority to write into this section this important and far-reaching provision? We refer those to whom the answer is not self-evident to such cases as Orthwein v. Germania Life Ins. Co., 261 Mo. 650; and Stephens v. Gordon, *ante*, p. 207. What would have been the position and probable order of the circuit court, or of this court, depending upon where the cause was pending, had the probate court notified either that, notwithstanding such superior courts had jurisdiction, of both the person and the subject-matter, *it* had determined *all* matters pertaining to the estate, including that involved in the suit, and had decided that the estate was fully administered and that such superior courts could not further lawfully proceed?

We have also examined section 196, Revised Statutes 1909, which requires executors to keep a list of all demands exhibited and make return thereof to the probate court; as well as section 193, which makes service of process in a suit a legal exhibition of the claim,

but we have been unable to find any provision making the effect and application of these sections depend, in cases of suit, upon whether such suits are prosecuted to a final judgment before the probate court allows a final settlement to be made. Or, otherwise, expressing the results of our statutory research, we have not so far found that after such jurisdiction attaches its duration depends upon the precision or imprecision with which things *appear* to the probate judge, or the slowness or speed with which he makes orders. I have always understood, that principal among the distinguishing characteristics of our governmental scheme and system, were our fixed and uniform rules of action, instead of the varying, though honest, views of those entrusted with power.

In *Smiley v. Cockrell*, 92 Mo. l. c. 112, *SHERWOOD, J.*, speaking, said: "I do not believe that, in any event, the jurisdiction of the circuit court having *once* attached could be divested by any subsequent action of the probate court, pending litigation in the former court. [*Seibel v. Simeon*, 62 Mo. 255.]" In *Nolan v. Johns*, 108 Mo. l. c. 437, *MACFARLANE, J.*, said: "It has been held by this court, and justly, too, that an administrator cannot defeat the jurisdiction of the circuit court when once acquired, by making final settlement of the estate and obtaining an order of discharge as such administrator from the probate court. The ends of justice could not be thus defeated. For the same reason no action by the administrator, or order of the probate court removing him from his trust, or accepting his resignation, could deprive the circuit court of its jurisdiction to proceed to the determination of the matter before it." In *In re Hutton's Estate*, 92 Mo. App. l. c. 139, *SMITH, P. J.*, speaking for the court, said: "The jurisdiction of the circuit court having once attached, would not be divested by any subsequent action of the probate court pending the litigation in

that court; nor in this, because to make a final settlement under such conditions would be a fraud, since the estate was not then fully administered and could not be until the claim made by the exceptors was finally adjudicated or in some way extinguished." In *Ryans v. Boogher*, 169 Mo. l. c. 683, it is said: "If this is true in all its broadness, it will follow that one who has a claim against an estate may bring it in a court to which jurisdiction is expressly given to hear and adjudicate it, and may commence it within the time designated by statute, and yet if for any reason final judgment is not rendered in his behalf within two years from the taking out letters testamentary or of administration, the judgment cannot be enforced against the estate. In a word, it matters not that the plaintiff or claimant is diligent and guilty of no laches whatever, if for any reason the proceeding does not ripen into a judgment within two years and is not classified, it amounts to nothing so far as receiving satisfaction is concerned. Heretofore the statute has received no such construction."

Looking at and analyzing respondent's return and briefs, we find the contention that both the estate as an entity and its executrix as a legal representative were extinguished and withdrawn from the jurisdiction of the circuit and this court by reason and means of the action of the probate court in declaring the estate fully administered and finally settled, and that this action and these results are authorized and made lawful by section 239, Revised Statutes 1909. This section provides that "if it appear to the court [probate] that such notice was duly published [notice of final settlement], and that the estate of the deceased has been *fully administered*, the court shall make final settlement." This section expressly names but two conditions which must appear to the court before it is warranted in making the settlement: (1) That notice

thereof has been duly published, and (2) that the estate has been fully administered; but is there not another thing which *must appear* and *actually exist* before the court can lawfully determine either of these? Must it not have complete jurisdiction over *such matters* before it can lawfully and finally determine them, and when part of the estate and one of the *very* things which must appear before the probate court can lawfully act is within the lawful and exclusive jurisdiction of *another* and *superior* court for determination, has it jurisdiction to pass on that thing? Statutes *in pari materia* should be read together and so construed as to keep all provisions of law on the same subject in harmony and effect, if possible.

Let us look now to the conditions prevailing when the alleged final settlement was made. A suit on demand, which subsequently ripened into judgment, was pending, by reason of another statute, in a court of competent jurisdiction against the estate. The legal representative of the estate was present and actively defending the estate against the suit. The subject of litigation, that is, the liability of the estate thereon, and the estate itself for this purpose, were in the exclusive jurisdiction of that court, the probate court not having even attempted to entertain jurisdiction thereof. There were then available assets belonging to the estate with which to satisfy the judgment, either in whole or part, if any were rendered, and these assets, under the law, were held in trust for this purpose. Until the estate's liability on this demand was determined the estate was not fully administered. [In *re Hutton's Estate*, 92 Mo. App. l. c. 139; *Ryans v. Boogher*, 169 Mo. 673; *Smiley v. Cöckrell*, 92 Mo. l. c. 111.] The probate court had no jurisdiction to determine this liability (*Ryans v. Boogher*, 169 Mo. l. c. 685), or whether the claim should or should not be allowed and

paid. Did it then have the *necessary jurisdiction* to determine that the estate was fully administered?

Our law provides a complete plan and scheme for the administration and final settlement of estates. It requires that demands be exhibited within a specified time, or be forever barred, and that during the time so allowed the estate shall be preserved and held in trust for the satisfaction of such lawful demands. It provides that after demands are exhibited they shall be legally established and prescribes the procedure by which and the forums in which this shall be done, and how and when they shall be paid. It places all claims of the same class on the same basis and contemplates that all questions of liability will be determined and all discharged before legatees or devisees shall participate. Recognizing the uncertainties and delays frequently attendant upon such matters, it fixes no definite *time* when the estate shall be finally settled, but names a condition which determines this, that being, when fully administered; and that condition is of such a nature as to enable the law to fully carry out its purpose. Further recognizing, however, that after an estate has fulfilled its chief function, that is, submitted itself to the payment of lawful debts, the remainder should go to those entitled thereto, it provides for a final settlement. Such a settlement, when lawfully made, destroys the estate as an entity and removes all powers of its lawful representative. Its substance is distributed and its demise becomes complete. If the settlement by respondent in 1909 was *lawful* and *final* it had this effect on the jurisdiction of the circuit and this court. Absent grounds of estoppel, etc., it effectively removed from that jurisdiction the person of the legal representative of the estate, because her representative capacity was then and thereby terminated.

Adopting respondent's view that under our system of laws there is no such thing as an administrator

ad litem or *pro hac vice*, and that the power to appoint representatives of estates dwells only with the probate court, neither this nor the circuit court could have appointed anyone to represent the defendant in that litigation, and the cause would necessarily have abated, unless, perchance, the probate court, acting with authority, appointed an administrator *de bonis non*. But, pursuing this subject, further, we find that the probate court has no authority to appoint such an administrator for this purpose. After final settlement an administrator *de bonis non* can be appointed *only* upon the discovery of *unadministered assets*, and then only when there are unpaid *allowed* demands against the estate. [Sec. 54, R. S. 1909.] Respondent says, however, that notwithstanding his action did destroy the jurisdiction of other courts over the person it was justifiable, because had he removed the executrix (Sec. 50, R. S. 1909), or had she died (Sec. 54, R. S. 1909), or resigned (Sec. 51, R. S. 1909), such jurisdiction would have been destroyed. The answer to this, however, is clear, and is that in such cases the person is removed from the jurisdiction *lawfully* and in a manner provided, and in all such cases ample provision is made for the immediate appointment of a successor, who, upon mere motion, is substituted and all interference with the other jurisdiction is thereby avoided. Absent the jurisdiction and lawful proceedings of the probate court (Sec. 50, R. S. 1909) to remove an executor, its order attempting such would not remove; and that is the deadly parallel between the cases cited by respondent and the one at bar. Is there not some significance in the failure of the Legislature to provide for the appointment of an administrator or representative under conditions which have existed in connection with this demand, or some arrangement by which it could be satisfied after establishment, if, in point of law, the settlement made by respondent, which ex-

cluded it, was lawful. After expressly conferring upon circuit courts the power and jurisdiction to determine matters so important to the estate and its creditors, does it not seem strange that no provision is made for making this power effectual, if the probate court can, whenever certain things *appear to it*, and regardless of actual conditions, decree the extinguishment of the estate and the legal capacity of its representative, as well the incapacity of the claimant to further lawfully proceed? Not only did this settlement, if valid, remove from our jurisdiction and end the capacity of the legal representative, but the estate as well, and until resurrected by another suit and successful trial on altogether different issues, it too was snatched from our hands and placed beyond our reach. Relator had a lawful right to have her claim, when properly established, allowed against the original estate. She was proceeding to this end in a lawful way, and now must she resurrect and breath life into something which she did not destroy, and something which upon its uncertain reappearance may be without substance? Let the gory locks shake at those who did it. The law must be so construed as to avoid clashes and conflicts between courts and their jurisdiction, otherwise confusion and chaos will come out of what is intended as order.

It is our opinion that the determination of relator's demand was a part of the administration of the estate, and this being lawfully in the exclusive jurisdiction of the circuit and this court, the probate court did not have the necessary jurisdiction to pass upon the question of whether the estate was fully administered, and by reason thereof its settlement of July 7, 1909, purporting to be a final settlement, had only the effect of an annual settlement, and beyond this was absolutely void. Our conclusion in this respect seems to be in perfect harmony with the course and conduct of

the estate's legal representative and attorney. Notwithstanding the alleged final settlement in 1909, and the alleged discharge of the executrix, she, in the capacity of an executrix and without the remotest suggestion of her legal incapacity, has continued for a period of six years since to appear in this and the circuit court to defend this action. Twice in the circuit court on trial, and twice in this court on appeal, has she appeared and defended in a representative capacity. "Wherefore do ye spend money for that which is not bread, and your labour for that which satisfieth not?" (Isa. 55: 2), and why make others work "for the meat which perisheth?" (John, 6:27).

In *Smiley v. Cockrell*, supra, (l. c. 112), this court made the following observation in this relation: "And in this connection, it is not to be forgotten that these same executors appeared in this court in 1883, and took part in the appeal, although they *now* claim that they had made their final settlement and were discharged in 1881. Such subterfuges are not to be tolerated in a court of justice." We shall impute no bad faith to the parties who have thus acted, but shall content ourselves with the belief that their views on the law were in accord with ours.

II. In the preceding paragraph we have considered only the lack of the probate court's jurisdiction because of the concurrent and exercised jurisdiction of other courts, and have not dealt with the question, exhaustively briefed by both parties, as to whether in cases where demands are not pending in other courts the matter of an estate being fully administered is itself jurisdictional, and if in point of fact it is not fully administered the probate court is wholly without jurisdiction to make a final settlement. As heretofore pointed out, the authority for final settlements is found exclusively in section 239,

**Final
Settlement:
Collateral
Attack.**

Revised Statutes 1909, and before such can be made it must appear to the court that notice was duly published and the estate has been fully administered. It will be observed that no distinction is made in the method or tribunal provided for determining whether notice was duly published and the estate has been fully administered. The language employed is the same as to both requirements. It has been uniformly held in this State that in point of fact due publication of notice must be had in order to give the settlement the force and effect of a final settlement, and if it is not, the settlement, as a final one, is void, and subject to collateral attack, and this notwithstanding the manner in which the point *appeared* to the probate court. [Brashears v. Hicklin, 54 Mo. l. c. 104; Van Liew v. Beverage Co., 144 Mo. 509; Lenox v. Harrison, 88 Mo. 491; Mead v. Bakewell, 8 Mo. App. l. c. 553; May v. May, 189 Mo. l. c. 502; Ratliff v. Magee, 165 Mo. 461.] If publication of notice is a fact which must *really* exist, regardless of the probate court's decision thereon, I see no escape from the conclusion that full administration of the estate is a fact which must likewise exist, as we cannot make fish of one and flesh of the other. It may be argued, however, that this does not follow, because notice is something specifically required by another section (section 238, Revised Statutes 1909), while there is no such express requirement as to full administration; but this is not correct. Throughout our whole scheme and system of administration law we find an ever-present and never-resting idea that the estate be fully administered before it be finally settled and distributed, and the express language of section 239, *supra*, to this effect is but stating generally a requirement logically deduced from the harmonious effect of the law as a whole. Our administration laws, when taken together, constitute a congruous, coherent and complete system, and when we observe the absence

of any provision for further administration after settlement is made (except in one event which could not be covered by the original administration) the view of full administration before final settlement materially strengthens. But why muse upon this, when this court has already said in *Ryans v. Boogher*, 169 Mo. l. c. 686: "It is clear that the probate and circuit court correctly ruled that defendants had no right to make a final settlement until they had discharged the debts of the deceased which had been reduced to judgments. Until then they had not 'fully administered' the estate, and until then the devisees and legatees had no right to receive the estate in their hands." In the case just quoted from, this court held that until all debts were paid, and all suits in other courts were finally determined, a final settlement was not warranted; and in *Smiley v. Cockrell*, 92 Mo. l. c. 111, the court said: "Under the provisions of section 239, R. S. 1879, the probate court is not authorized to make final settlement, unless the estate is '*fully administered*,' but an estate cannot be said to be fully administered, while the demands of creditors remain unadjusted and unsatisfied, and that which should have gone in satisfaction of their demands is diverted from its legitimate purpose to the satisfaction of claims which should always be subordinated to the demands of executors." In *In re Hutton's Estate*, supra, it is said: The estate could not be fully administered "until the claim made by the exceptors was finally adjudicated or in some way extinguished."

Relator has also presented various authorities from other jurisdictions seemingly holding in accord with the above cases, and further holding that until the estate is fully administered a final settlement cannot be lawfully made and is void for lack of jurisdiction. Most of these cases were decided upon statutes not altogether like ours, but similar in many important

respects. Among these cases are the following: Pollock v. Buie, 43 Miss. l. c. 149; Henderson v. Winchester, 31 Miss. l. c. 294; Dogan v. Brown, 44 Miss. 235; Blanchard v. Williamson, 70 Ill. 647; Sutherland v. Harrison, 86 Ill. 363; Starr v. Willoughby, 218 Ill. 485; People v. Rardin, 171 Ill. App. 226; and we refer those who desire to pursue this subject further to these.

As tending to support the doctrine that jurisdiction to approve final settlement does not depend upon the fact that the estate is fully settled, respondent cites certain Missouri cases, which we shall review.

In Ratliff v. Magee, 165 Mo. 461, it was merely held that a claimant who during the former administration had submitted himself to the jurisdiction of the probate court, and had his demand classified and paid only in part, because of insufficient assets, must proceed in accordance with the statute on *unadministered assets* and *allowed* claims, when he relies upon the discovery of new and unadministered assets. There was then, as now, an express statute on that particular subject prescribing the procedure which should be followed in such cases.

McLean v. Bergner, 80 Mo. 414, was a suit to vacate and annul a final settlement, made ten years prior thereto, and was filed and tried upon the theory of lack of notice and fraud in procuring settlement.

Robards v. Lamb, 89 Mo. 303, deals merely with an administrator *pendente lite*, and does not involve any question of the settlement of *estates*.

Smith v. Hauger, 150 Mo. 437, was decided upon questions of fact, estoppel and insufficient summons.

Clyce v. Anderson, 49 Mo. 37, was a direct action to set aside a final settlement for fraud, and conceded the validity of the settlement, unless fraud in procuring same was established.

Michie v. Grainger, 149 Mo. App. 301, is a case decided by the Springfield Court of Appeals, and holds

that after an administrator makes final settlement and full distribution of the estate's assets, he cannot if he discovers that he has failed to pay a certain allowed claim personally pay this and take an assignment of the claim and then recover thereon from the devisees, unless he has his former settlement set aside.

In all of these cases the general doctrine is announced that where a final settlement is made, in accordance with the law then in force, it has the force and effect of a final judgment. Aside from this general pronouncement, the correctness of which all concede, these cases, unless it be the Court of Appeals decision, *supra*, contain nothing bearing upon the question here presented.

In view of the purpose and effect of our laws on administration, the provisions they do and do not contain, and of our former adjudications, we are of the opinion that a probate court is without the jurisdictional power to approve a final settlement as long as in fact demands are legally pending and undisposed of in either the probate court or other courts of record, and there are available assets for their satisfaction. This doctrine is in keeping with justice and orderly procedure, and less capable of abuse than the contrary. The legal representative of an estate and the probate courts are provided with every means and facility necessary to readily ascertain whether demands which have been made of record are undisposed of and an estate has been fully administered, and their failure to use these and do their duty should not be made a lawful means of defeating just and lawful demands, or the very ends for whose accomplishment they are created and maintained. We cannot bring ourselves to the conviction, that regardless of the number of legally established demands there may be against an estate, demands of whose existence the officers know, or should know, a settlement which ignores

and excludes them and which diverts the estate's assets from their lawful payment to other subordinated purposes can be legal and binding. Before a condition can be said to have *appeared* to exist there must be some reasonable and lawful justification for such *appearances*.

III. Our conclusion that the alleged final settlement had only the force and effect of an annual settlement necessarily disposes of the question of the effect which that settlement had on the legal capacity and authority of the executrix, and it is unnecessary for us to consider the numerous cases cited in this relation. Not having been finally and lawfully discharged she has been at all times since she qualified, and yet is, the legal representative of the estate, and the estate is bound by all judgments in cases where she as the representative was duly served.

IV. Is *mandamus* a proper remedy in this instance? In former adjudications this court decided that relator's claim had been legally and timely exhibited against the estate, and that relator was entitled to a judgment in a certain and fixed sum, and directed that such judgment be entered. It also held that this judgment claim was entitled to classification in the fifth class of claims. When the record of all these matters were presented to respondent he disregarded the direction and ruling of this and the circuit court and refused to act upon the application and classify the claim, basing his action solely upon the lack and absence of jurisdiction. His decision that he had no jurisdiction was based entirely upon admitted and undisputed record facts. This court has so recently and exhaustively (in State ex rel. v. Homer, 249 Mo. 58) reviewed the authorities upon this subject that we can do no better in

stating our general doctrine than by reproducing what is there said:

“Nor will mandamus usually issue where there are other adequate remedies, but in the light of this rule the other remedies or remedy must be fully adequate. The mere fact that there might be another remedy is not sufficient to preclude the use of the writ of mandamus. The other remedy must be adequate, and whether it is adequate is one appealing to the judgment and discretion of this court when the circumstances of each case are laid before us. . . . The circuit court had in a way determined its jurisdiction over the defendants in the circuit court case, but its determination was upon admitted and undisputed record facts. Whether that court had jurisdiction of the defendants thus became a pure question of law. It may be that an appeal or some such remedy was at hand, but was that remedy adequate? Under the facts we could have well said that it was not.

“But aside from this there is much respectable authority to the effect that mandamus is the only proper remedy where a circuit court refuses to proceed with a case, because the court was of opinion that it did not have jurisdiction of the cause, or of the parties to the cause. In the circuit court case the trial court refused to entertain jurisdiction and proceed with the case upon a preliminary objection to the return of service to the process. In the very early case of *Castello v. St. Louis Circuit Court*, 28 Mo. l. c. 274, we had up a very similar question. The question there was whether a notice of contest in a contested election case was sufficient to give the circuit court jurisdiction to hear and determine the case upon its merits. The circuit court held the notice insufficient and refused to proceed further with the case. This court issued its alternative writ and then proceeded to determine whether or not the trial court was right or wrong in

refusing to proceed further. We held that the trial court was right and that the notice was insufficient, and denied the peremptory writ for that reason, but in the course of the opinion we thus spoke upon the question in issue here:

“ ‘Upon the facts disclosed in the petition in this case for a mandamus upon the circuit court, a majority of this court determined that a conditional mandamus should be awarded, and it was accordingly so ordered. This determination was based upon the principle that where an inferior judicial tribunal declines to hear a case upon what is termed a preliminary objection, and that objection is purely a matter of law, a mandamus will go, if the inferior court has misconstrued the law. The cases of the *King v. The Justices of the West Riding of Yorkshire*, 5 Barn. & Adol. 667, and *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1113, *The King v. Hewes*, 3 Ad. & Ellis, 725, and *Regina v. The Recorder of Liverpool*, 1 Eng. Law & Eq. R. 291, are believed to be conclusive upon this point so far as the English authorities go; and our attention had not been directed to any American cases conflicting with this view of the law. If the circuit court declined to go into the merits of the case because the party complaining had not given the notice required by the statute, that was a preliminary objection upon a point of law which this court can review upon a writ of mandamus; and if the circuit court called for a notice which the statute did not require, the mandamus ought to be made peremptory.

“ ‘It is not deemed important to go into any examination of this question, since upon the return to the conditional mandamus by the circuit court, we were satisfied that the construction which that court gave to the statute was correct.’

“ ‘So in the case at bar. The trial court entertained an objection to a preliminary matter and then

refused to proceed further. The return was before the court and was therefore an undisputed fact, and it was thus a pure question of law as to whether the court should hear the case upon its merits. The doctrine of the *Castello* case, *supra*, has since met with the express approval of this court in the later case of *State ex rel. Bayha v. Philips*, 97 Mo. l. c. 347. This latter case was a mandamus against the Kansas City Court of Appeals. Over the protest of Bayha that court had dismissed a case appealed by Bayha for the reason that it was made to appear to the court by motion of the respondents that the tax bills which Bayha sought to have cancelled by his bill had in fact been cancelled. In the case *SHERWOOD, J.*, discusses at length the powers of this court by mandamus against inferior courts and in closing, thus speaks:

“‘But as already shown, the Constitution has conferred on this court more enlarged powers, and consequently the rulings on the point in courts of others jurisdictions, not possessed of such ample powers, can have no application here. And whatever the rulings of other courts may have been in respect to the issuance of writs of mandamus, the rulings of this court, heretofore made, establish that this court will award its writs of mandamus: Where the St. Louis Court of Appeals refused to take a bond for an appeal to this court on the ground that the appeal having been granted, that court had no further jurisdiction of the cause. [*State ex rel. v. Lewis*, 71 Mo. 170.] Where a circuit court refused to enter judgment on a verdict, but granted a new trial. [*State ex rel. v. Adams*, 76 Mo. 605.] When a trial court ordered a cause to be “dropped from the docket.” [*State ex rel. v. Cape Girardeau Court of Common Pleas*, 73 Mo. 560.] Where a trial court determined it had no jurisdiction of a criminal cause, by reason of the unconstitutionality of a statute and ordered the cause transferred to

another court. [State ex rel. v. Laughlin, 75 Mo. 358.] To compel the judge of a trial court to enter a judgment on a verdict, which he had refused to receive, because the jury by that verdict found for the defendants, but required them to pay the costs. [State ex rel. v. Knight, 46 Mo. 83.] In *Castello v. Circuit Court*, 28 Mo. 259, it is said: "If the circuit court declined to go into the merits of the cause because the party complaining has not given the notice required by the statute, that was a preliminary objection upon a point of law which this court can review upon a writ of mandamus; and if the circuit court called for a notice which the statute did not require, the mandamus ought to be made peremptory." [See also, *Miller v. Richardson*, 1 Mo. 310.]'

"And in this same case at page 343 we thus cite with approval the case of *Ex parte Schollenberger*, 96 U. S. 369:

" 'In *Ex parte Schollenberger*, 96 U. S. 369, the circuit court, in which the suit was brought, because of opinion it had no jurisdiction, quashed the process, and it was held that mandamus would lie to compel it to reinstate and hear the cause, as it had jurisdiction, though it had erroneously decided to the contrary.' The California Court of Appeals has likewise quoted from and approved the *Castello* case in the case of *Hill v. Superior Court*, 114 Pac. l. c. 808 et seq. In the *Hill* case, the lower court had quashed a citation in an election contest case and thereby refused to hear the contest. In the course of that opinion it is said:

" 'At the time and place appointed for the holding of said special session the court quashed the service of said citation, and refused to hear the contest of petitioner, for the reason that the notice to the court by the clerk was given and the order of the court fixing the special session was made prematurely, and the citation was issued prior to the time fixed by the stat-

ute. Upon application to this court, an alternative writ of mandate was issued, and it is now sought to have it made peremptory upon an answer admitting all the facts set out in the petition. While, technically speaking, the order of the court below simply directed the citation to be quashed, it amounted to a refusal to proceed with the trial of the contest on the ground that the court had no jurisdiction of the person of the contestee by reason of the premature order and service as aforesaid. . . .

“ ‘As we view it, then, the trial judge, upon a preliminary matter, decided contrary to the law and the facts, that the court had not acquired jurisdiction of the “contestee,” and therefore was not authorized to proceed with the trial at the time appointed. Upon our understanding of the statutory provision, the court had and still has jurisdiction of the subject-matter and of the parties, and it was its plain duty to proceed to trial at the time appointed. It could not divest itself of this jurisdiction by an order purporting to quash the citation, nor is there a case presented here of jurisdiction to decide wrong as well as right beyond the reach of the writ of mandate. Where there is no conflict as to the facts and in the judgment of the higher tribunal those facts confer jurisdiction and make it clearly the duty of the lower tribunal to proceed with the trial of the cause, if there is no other adequate remedy, the writ of mandate will issue commanding such action. . . .

“ ‘The authorities are in line with these reflections.’ The California court likewise quotes with approval what this court said in the Bayha case, 97 Mo., *supra*, concerning the Schollenberger case, 96 U. S. 369. It will be noticed that the California court lays some stress upon there being no conflict of facts in matters touching the jurisdiction or right to proceed. In the case at bar the facts stand admitted and undis-

puted. They are in fact bound up as a part of the judgment roll. This court, like the California court, has made some observations as to the admitted facts concerning jurisdiction, and in what cases the extraordinary writ will issue. Thus in *State ex rel. Crouse v. Mills*, 231 Mo. 1. c. 500, we said:

“ ‘Where the jurisdiction of the probate court is dependent upon the fact of the person being within the territorial jurisdiction of the court, a writ of prohibition will not lie to prevent the probate court from investigating the necessary facts to determine its own jurisdiction, nor could prohibition be granted to prevent an entry of the court’s judgment, whether that judgment be right or wrong, as to the jurisdiction over the person. In other words, if the law determines the right of a court to entertain or not entertain jurisdiction of a case, then prohibition will lie, but if jurisdiction is contingent upon facts, unless such facts be admitted and not disputed, the lower court has the right to determine its jurisdiction from the facts before it.’

“The latter clause of the quotation is the more applicable portion. But in the case at bar the actual return was admitted and not denied. It was a part of the files of the case the circuit court was then dealing with and the circuit court was simply determining whether it would proceed or not proceed upon an admitted fact. Other courts have followed the same trend of thought, thus:

“The Supreme Court of the United States, *In re Hohorst*, 150 U. S. 663, issued a mandamus, directing the United States Circuit Court of the Southern District of New York to take jurisdiction of and proceed with the trial of a case, in which the circuit court had set aside and quashed the service and dismissed the suit, saying: ‘The Hamburg-American Packing Company being liable to this suit in the Circuit Court of the United States for the Southern District of New

York if duly served with process in the district, and having been so served, and the order of that court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the circuit court to take jurisdiction of the suit as against the corporation.'

"The Supreme Court of Alabama, on January 20, 1910, in *Ex parte Hill*, 51 So. 786 (Syl. 4), held: 'Where the court makes an order quashing the service of process on an unincorporated association, which order is erroneous and works an injury to the plaintiff in the action against the association, and no appeal lies from the order, and no other remedy exists, mandamus will issue to the judge, commanding him to vacate the order.'

"The Supreme Court of Florida, in *State ex rel. v. Wills*, Judge, 38 So. l. c. 291, said: 'Another contention for the respondent is that the issuance of a writ of mandamus in this cause would be a review of his judicial discretion, which can properly be done only by appropriate appellate proceedings, the respondent claiming that he had assumed jurisdiction of the cause by entertaining and granting the motion to dismiss the appeal, thus determining a question of practice only. It is conceded that the appeal was dismissed because no writ of error had been issued in the cause, and that the court held that the issuance of a writ of error was necessary to give the court jurisdiction of the appeal. A dismissal on the ground of the want of jurisdiction is not such an assumption of jurisdiction as to require its review by appellate proceedings.'

"The question was directly decided in *Hill v. Morgan*, 76 Pac. 323. The trial court, in that case, held that the summons was insufficient to give it jurisdiction to hear the cause, and set aside the service of the

summons. It was held (Syl. 1-2): 'The rule that mandamus will not issue to control discretion or revise judicial action has no application to the determination of preliminary questions relating to the sufficiency of the service of summons. When the tribunal or officer whose duty it is to take jurisdiction of a matter, and believing erroneously that it has no jurisdiction, declines to consider the matter, mandamus will issue to compel action.'

"In *People ex rel. v. Judge of Wayne Circuit Court*, 22 Mich. 493, it is held: 'Where suit is commenced by declaration against the maker and indorsers of a promissory note in the circuit court for the county where the indorsers reside, the service is first duly had in said county upon the defendants residing herein, and thereupon, by virtue of Act No. 54 of 1869 (Sess. Laws 1869, p. 101), service is made upon the maker, who resides in another county, by the sheriff of the county where maker resides, and the circuit court on motion, orders such service, as to said maker, to be set aside as unauthorized by said statute, mandamus will be granted to compel said court to vacate said order.'

"Returning now for some analogous cases in Missouri. In *State ex rel. v. O'Bryan*, 102 Mo. 254, we have a case where a cause was sent by change of venue from the Cape Girardeau Court of Common Pleas to the circuit court of Scott county. The latter court held that the cause had been improperly sent to it and ordered it stricken from the docket and the papers returned to the common pleas court. The common pleas court, holding that it had lost jurisdiction, ordered the papers returned to the circuit court of Scott county. That court then dismissed the cause. This court was then applied to for a writ of mandamus and one was awarded. In that case (l. c. 259), we said:

“ ‘It had been urged that inasmuch as the Scott Circuit Court had made its final order remanding the cause to the common pleas court, and inasmuch as the latter court, after this was done, simply made its order directing the return of the papers to the Scott Circuit Court, that therefore the latter court is not vested with jurisdiction to try the cause, etc. To this objection it may be answered that the order made by the Scott Circuit Court as aforesaid was *coram non judice*. That court had no more authority under the law and the facts to make such an order than it would have had to have sent the cause to the circuit court of Mississippi county. Such orders are nullities and consequently oppose no barrier to a correct method of procedure when the error committed is ascertained. [State v. Gabriel, 88 Mo. 631.] Nor is it any obstacle to the obtaining of the proper relief here, because the lower court has acted. [Bayha’s Case, 97 Mo. 331, and cases cited.]

“ ‘Nor would an appeal or writ of error afford any substantial or effectual remedy in a case of this sort. Were an appeal taken in an instance like the present, there would be nothing to pass upon, no errors to correct; for no trial had occurred. It is not the intention of the law to permit a cause to be bandied about like a shuttle-cock from court to court without affording a more effective and prompt relief than would be afforded by an appeal or writ of error.

“ ‘The premises considered, we do not doubt that this is an appropriate occasion for the exercise of our supervisory control and mandatory authority and consequently we issue our peremptory writ. All concur.’

“ ‘And in a separate opinion BARCLAY, J., further said:

“ ‘Under the statutes governing this case, fully set forth in the foregoing opinion, it appears to me that the learned judge of the Scott County Circuit

Court was in error in refusing to take jurisdiction of the cause referred to. While the plaintiff therein might properly have resorted to a writ of error or an appeal to rectify that ruling, it seems to me he was not necessarily bound to do so.

“‘Under the Constitution of this State, giving the Supreme Court “a general superintending control” over the trial courts (Const. 1875, art. 6, sec. 3), it is within the proper scope of the constitutional authority of this court to intervene by the writ of mandamus to reinstate a cause which has been erroneously stricken from the docket at the circuit, and in which a hearing there is absolutely denied. In such a case we think the party injured should not be put to the delay of an appeal.’

“So, too, we have by mandamus compelled the Courts of Appeals to reinstate and hear cases, after such courts had dismissed the appeals therein. [State ex rel. v. Smith, 172 Mo. 446; State ex rel. v. Broadus, 210 Mo. 1; State ex rel. v. Broadus, 234 Mo. 331; State ex rel. v. Broadus, 239 Mo. 359.] In all these cases the Courts of Appeals had passed upon preliminary matters and disposed of the appeals without going into the merits. This court of necessity had and did examine into the same preliminary questions and holding opposite views upon the said preliminary questions directed the Court of Appeals to undo what it had done, and proceed to do what it should have done, i. e., decide the merits of the case.

“That an appeal in the case at bar and under consideration was not a full and adequate remedy is sustained by the following cases: State ex rel. v. O'Bryan, 102 Mo. 254; Sedgwick Furniture Co. v. Craig, 160 Mo. App. 91; French v. Bennett, 72 S. E. 746; Mining Co. v. Fremont, 7 Cal. 130; People's Bank v. Burdett, 71 S. E. 399; 26 Cyc. 171.”

This case, however, does not depend wholly upon such general doctrine. The writ should be awarded upon, if no other, the ground that it is a proper means of carrying out and giving effect to the judgment which this court directed and commanded. It is accordingly ordered that our preliminary writ be made permanent. *Woodson, C. J.*, and *Graves, Walker and Blair, JJ.*, concur; *Bond, J.*, concurs in separate opinion in which *Faris, J.*, concurs.

BOND, J. (concurring)—I concur in the learned opinion of our Brother REVELLE for the following reasons:

The probate court had no *legal right* to close the administration pending a timely suit in the circuit court to establish a demand against the estate, for until that suit should be finally determined the estate could not be *fully* administered, and that court is only permitted to adjudge a final settlement after a full administration. [Sec. 239, R. S. 1909.]

When the certified copy of the judgment of the Supreme Court was presented to the probate court, the latter court was advised of a conclusively adjudged fact (a large indebtedness against the estate), which, if it had known at the time, would have prevented this judgment discharging executrix, and was further advised that the plaintiff in the judgment exhibited was entitled under the statute to have it filed as an established demand against the estate. Hence it was the plain duty of the probate judge, upon the exhibition to him of the final judgment of this court, to have ordered the proper classification of the said judgment as a demand against the estate of Samuel Leathe, and to have set aside and for naught held the entry on the records of the probate court of July 7, 1909, purporting to show a final settlement of said estate and the discharge of the executrix.

The facts warranting such action on the part of the probate judge were *conclusively* shown by the certified transcript of the proceedings and final decision and judgment of this court fixing the amount of the demand against the executrix of the estate.

Hence there was no necessity for the adoption by the plaintiff in that judgment of other modes of redress which might be applicable, except for the conclusive effect and the controlling force of the final decision and judgment of this court. *Faris, J.*, concurs in this opinion.

THE STATE ex rel. CHARLES M. YORK, Assistant
Prosecuting Attorney of Schuyler County, v. J. S.
LOCKER, Judge of Probate Court.

In Banc, December 22, 1915.

1. **COURTS: Legislative Jurisdiction.** As to a constitutionally recognized court, it is a general rule that the Legislature can neither add to nor subtract from the jurisdiction provided for it by the Constitution. And the enumeration in the Constitution of certain specific powers, with no hint of others to be added by law, is to be considered as an exclusion of all other powers.
2. **PROBATE COURTS: Power to Issue Habeas Corpus and Injunction Writs.** The Constitution enumerates the matters of which probate courts shall take cognizance, and neither a proceeding in *habeas corpus* nor a writ of injunction is among them, nor is either akin to the subjects named. The Constitution confers no power upon probate courts to issue writs of *habeas corpus* or injunction; and so much of section 2442, Revised Statutes 1909, as attempts by the use of the words "some court of record" to confer upon probate courts such power, is unconstitutional and void.
3. **HABEAS CORPUS: What Courts May Issue.** The Supreme Court, courts of appeals, circuit courts and county courts (when aided by statute) have a constitutional warrant for issuing writs of *habeas corpus*, but the Constitution confers no such power on probate courts, nor does it authorize the Legislature to confer it.

Prohibition.

WRIT GRANTED.

Walter Higbee and Charles M. York for relator;
Higbee & Mills of counsel.

(1) The probate court or the judge thereof has no jurisdiction to issue a writ of *habeas corpus*. Secs. 1 and 34, art. 6, Constitution; State ex rel. v. Tincher, 258 Mo. 15; State ex rel. v. Woodson, 161 Mo. 444; Johnson v. Railroad, 259 Mo. 544; Turner v. Anderson, 236 Mo. 529; State ex rel. v. Nast, 209 Mo. 719; 11 Cyc. 706, c; Harding v. State, 126 S. W. (Ark) 91; Finn v. Walsh, 121 N. W. (N. D.) 766, syl. 3. (2) The judge of the circuit court of Scotland, where petitioners were confined, had exclusive jurisdiction to issue the writ of *habeas*, there being no allegation in the petition that he was absent from the county. Sec. 2509, R. S. 1909; Ex parte Gaume, 162 Mo. 390; Ex parte Shoffner, 173 Mo. App. 403.

Fogle & Fogle for respondent.

(1) The probate court or judge in vacation had jurisdiction to issue the writ of *habeas corpus*. Sec. 2441, R. S. 1909; State v. Millsaps, 69 Mo. 359; State ex rel. v. Tincher, 258 Mo. 19; State v. Wilson, 175 S. W. 603. (2) *Certiorari* will lie from the Supreme Court to review the proceedings in a *habeas corpus* case pending the circuit court, and before those proceedings have culminated in a trial, order or judgment; and to inquire into an absence, excess or abuse of jurisdiction. State ex rel. v. Wurdeman, 254 Mo. 569. (3) Prohibition being an extraordinary writ cannot be resorted to when the ordinary and usual remedies provided by law, such as *certiorari* or other modes of review, are available. Mastin v. Sloan, 98 Mo. 252; State v. Klein, 116 Mo. 259; State v. Bower-

man, 40 Mo. App. 576; *Delaney v. Police Court*, 167 Mo. 679. (4) Application for the writ of prohibition is premature until exception has been taken to the jurisdiction of the lower court and overruled and will be refused if this has not been done, for it is invariably presumed that courts will give to parties the relief to which they show themselves entitled. *State v. Gill*, 137 Mo. 681; *State ex rel. v. Stobie*, 194 Mo. 14; *State v. Fox*, 85 Mo. 61; *State v. Withrow*, 108 Mo. 1; *State v. Anthony*, 65 Mo. App. 543.

GRAVES, J.—To give the respondent the benefit of all doubt, we adopt the statement of facts presented here by his able counsel. In the view that we now have, and long since have had, of the law, this statement of facts will suffice. It reads:

“Jacob Gardner, Ivan Huff and Noble Bass were arrested by the sheriff of Schuyler county, on the complaint of Rosa Hoxie, charging them with the crime of rape. They were brought before the justice who issued the warrants, and their preliminary hearing was set for the 17th day of June, 1915. On said day the said sheriff produced them before the said justice, and indorsed his return on the said warrants and delivered them back to the said justice. The accused then filed with the said justice, before the commencement of the said hearing, their affidavit for a change of venue to some other township. Said justice forthwith awarded a change of venue and ordered said cause sent to John Minear for hearing before him on the 27th day of June, 1915, and then and there issued and delivered to said sheriff, as jailor of said county, a commitment for said accused, and said sheriff took said accused to the jail of Scotland county, where he had been confining them on account of the insufficiency and insecurity of the jail of Schuyler county. Said accused were never taken before said John Minear, and the transcript of the other justice, together with the papers in

the cause, was not sent to nor filed with said John Minear until several days after the change of venue was awarded as aforesaid.

“Eventually, the said John Minear discovered that the 27th day of June was Sunday and he then served notice on the accused that he had set the 1st day of July for the hearing, thus adjourning said cause more than ten days without the knowledge or consent of the accused and contrary to the laws of Missouri.

“The accused then, on the 29th day of June, same being twelve days after the change of venue was awarded, applied to the probate judge of Schuyler county, in the absence of the circuit judge, for their discharge from custody, alleging that the said commitment so issued, and under which they were illegally restrained, was void and that they had not been accorded a hearing within the time fixed by law.

“The distinguished attorneys for the State contested the issuance of the writ of *habeas corpus*, but the probate judge, after hearing the arguments of counsel for both sides, issued the writ and delivered the same to said sheriff, and in compliance with said writ, said sheriff produced said accused before said judge and made and filed his return to said writ of *habeas corpus* on the 30th day of June, 1915. Then by agreement of counsel and on the request of the said accused the *habeas corpus* matter was set for trial on the 7th day of July, 1915. But the service of the provisional writ of prohibition being had, preceding said date, this matter thus stands in abeyance to this day.

“The accused, contending that the return of the warrants ended their force from that date, and that the said commitment was without any authority of law and void and of no force, now believe that they were entitled to their discharge at the time they filed their petition for the writ of *habeas corpus*; and they

now contend that, inasmuch as the sheriff attached the writ of *habeas corpus* to his return to said writ and filed the same therewith, he is now holding the accused without any writ, process, precept or warrant of law, and they are therefore entitled to their liberty.”

It should be added that as one ground for the application to this court for the writ of prohibition, it is charged that the probate courts of the State are without constitutional authority to issue writs of *habeas corpus*, and that therefore sections 2441 and 2442, Revised Statutes 1909, which purport to grant such authority are unconstitutional and void. In our judgment this contention is well founded, as we shall attempt to demonstrate, in the opinion to follow. Other grounds are urged, but if this be good, then the discussion of the others would be mere superfluity. This sufficiently states the case. •

I. The question here involved is an interesting one. I first became interested in it in the course of my early practice. That sections 2441 and 2442, Revised Statutes 1909, grant to probate courts as courts of record, the power to grant writs of *habeas corpus* must be conceded. We have also statutes authorizing a probate court to grant a temporary injunction. [R. S. 1909, secs. 2512 and 2513.] In a series of cases of the Rich Hill Coal Mining Co. *versus* divers parties, temporary writs of injunction were granted by the probate court of Bates county and the cases certified to the circuit court of said county for trial upon the question of a permanent injunction. These temporary writs were prepared by the local counsel for such Mining Company. In the circuit we moved to quash the preliminary injunctions on the sole ground that the probate court had no constitutional power to issue such a writ, and Hon. James H. Lay, then the circuit judge of the 29th circuit, sustained said motion. From that time on I have

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of Courts.

heard of no temporary injunction being granted by probate courts in that circuit. The question there involved is the question here involved. It is the simple question as to whether or not the Legislature can give to a court a power not contemplated by the constitutional provisions fixing the powers of such court.

It is a general rule that the Legislature can neither add to nor subtract from the constitutional powers of a court. In 11 Cyc. 706, it is said:

“The provisions of the Constitution may be such as to operate as an express restriction or limitation upon legislative authority in respect to matters of the character under consideration, and it is a general rule that the Legislature is powerless to interfere with the jurisdiction, functions, or judicial powers conferred by the Constitution upon a court, nor can it diminish, enlarge, transfer, or otherwise infringe upon the same, nor abolish, reorganize, divide, or consolidate such constitutional courts or judicial districts, especially so where the court has long been acquiesced in as permanent.”

In *State ex rel. Cave v. Tincher*, 258 Mo. 1. c. 17, WALKER, J., said:

“These cases, while aptly illustrative of the application of the general rule in regard to the limitations placed by the Constitution upon legislation, do not, except in the *Redmond* case (*Redmond v. Railroad*, 225 Mo. 721), have particular references to the jurisdiction of courts as defined by the organic law. The rule, however, was by clear implication approved in *Vail v. Dinning*, 44 Mo. 210, construing an act of the Legislature which authorized a contestor for the office of circuit judge to institute an original proceeding in the Supreme Court to determine the issue. WAGNER, J., speaking for the court, said: ‘In the first place, . . . the jurisdiction of this court is defined and limited by the Constitution. It has such powers and jurisdiction as the Constitution has con-

ferred upon it—no more, no less. It cannot shirk any duty imposed on it by the organic law, nor can it extend its powers to take cognizance of any matter not within the scope of its limited authority. The Legislature can neither add to nor diminish its rightful jurisdiction. That body can invest it with no original jurisdiction when it is not given by the Constitution, nor can they deprive it of its appellate jurisdiction.’ The doctrine here announced was approved in *State ex rel. v. Flentge*, 49 Mo. 488, in which the court held that the Legislature was not authorized to enact a law subjecting clerks of courts to trial in the Supreme Court for misdemeanors in office. By parity of reasoning it would seem that this rule should apply with equal force to any other constitutional court whose powers are therein definitely defined, as is the case in regard to probate courts. [Sec. 34, art. 6, Constitution.]”

It is true that Judge WALKER adds that even in violation of the rule the Legislature has added powers to the probate court, and instances there *habeas corpus* and injunctive statutes.

However in *State ex rel. v. Woodson*, 161 Mo. l. c. 454, Judge VALLIANT does not leave a debatable question in the case. He there says:

“It is contended that our statutes confer on the judge the authority to hear and determine the whole issues in a case of this kind in vacation. If there is such a statute, it is in violation of section 1, article 6, of our Constitution, above quoted. In that section the Constitution disposes of all the judicial power of the State in matters of law and equity, and it leaves nothing to be disposed of by the General Assembly. This is the view the Supreme Court of Michigan took of the same subject. That court said : ‘By article 6 of our Constitution, the judicial power is vested in one Supreme Court, in circuit courts, in probate courts, and in justices of the peace . . . Section 2 of this

act confers upon the judge in vacation the authority to hear and determine summarily upon the questions of the insolvency of the debtor; the giving or attempting to give preferences; his refusal or neglect to make assignment of his property; and his orders and judgment (if he makes any) are final and conclusive . . . A statute which confers such judicial powers upon a circuit judge at chambers is clearly in conflict with article 6, section 1, of the Constitution.' [Risser v. Hoyt, 53 Mich. 185.]”

It may therefore be safely asserted as a rule that as to the constitutionally recognized courts the Legislature can neither add to nor take from the jurisdiction provided for such court by the Constitution.

II. By section 1 of article 6 of the Constitution, the whole judicial power of the State is thus vested:

“The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts.”

**Probate Courts:
Power to issue
Writs of
Habeas Corpus.**

By later constitutional amendments the Kansas City and Springfield Courts of Appeals have been added to the foregoing list. By section 34 of article 6 the jurisdiction of probate courts is fixed. This section reads:

“The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians and the sale or leasing

of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices: Provided, that until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law."

We have a specific outline of the matters over which probate courts can exercise jurisdiction. Not a thing in this clause of the Constitution even hinting at any power in such courts to grant the extraordinary writs, either of injunction or *habeas corpus*. The subjects mentioned in this section are not even akin to injunction proceedings or *habeas corpus* proceedings. In other words the Constitution says to the Legislature, "You shall establish in every county a probate court," but it, in the very same section, says what matters shall be cognizable before such courts when so established, and a proceeding in *habeas corpus* is not one of the things named. Nor does it even fall within the general classes of matters there named. Following the general rule that constitutional clauses fixing the jurisdiction of a court are clauses restrictive in nature, there can be no doubt that the Legislature passed an unconstitutional and void law in the enactment of section 2442, Revised Statutes 1909, so far as the probate courts may be considered therein as courts of record. Whilst it is true that this section does not specifically name probate courts, yet it does say that the petition for the writ of *habeas corpus* must be addressed to some court of record, and a probate court is a court of record, so that such a court falls within the class of courts named in the statute. It is clear therefore that this section authorizes probate courts to hear such cases, and equally clear that such a power is not one given such court by the Constitution. The statute therefore, in so far as it attempts to include probate courts, is violative of the Constitution (Sec. 34, art. 6) and void.

Approaching the question from another angle we find that the Constitution-makers were somewhat specific with reference to writs of *habeas corpus*. Thus by section 3 of article 6 of the Constitution the Supreme Court is given specific authority to issue such writs—section 12 of the same article gives specific authority to the Courts of Appeals. Section 22 of the same article gives authority to the circuit courts. Such authority is not specific as are the other two, but is broadly couched in the language:

“The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all civil cases not otherwise provided for.”

From section 36 of article 6 may be gathered the power of a county court. That section reads:

“In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county *and such other business as may be prescribed by law*. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law.”

We have italicized the clause which might authorize the Legislature to confer jurisdiction in *habeas corpus* on such courts. So that of all the courts named in the Constitution, constitutional warrant to hear *habeas corpus* proceedings may be found for the Supreme Court, Courts of Appeals, circuit courts and county courts exercising such a power. Of the divers courts of record the probate courts stand alone without such a constitutional warrant of authority. Where the Constitution-makers were continually dealing with the subject of writs of *habeas corpus*, it is singularly strange that they would use language as to all courts of record tending to give authority for such a jurisdiction, and use the limited language found in section 34 of article 6 with reference to probate courts.

Having made ample provision for the hearing of such proceedings in other courts, the express powers given to the probate courts as to entirely different subject-matters should be considered as limiting the powers of such courts to the matters in said section 34 named. The constitutional granting of specific powers, without any hint of others to be added by law, must be taken as an exclusion of all other powers, including in such exclusion the hearing of *habeas corpus* proceedings.

We see no escape from holding that the statutory attempt to confer this jurisdiction upon probate courts is void and we so hold. It follows that our preliminary rule in prohibition should be made permanent and it is so ordered. All concur.

THE STATE ex rel. HOWARD A. GASS, State
Superintendent of Public Schools, v. JOHN P.
GORDON, State Auditor.

In Banc, December 22, 1915.

1. **REVENUE: Meaning of Word.** Unrestricted by the word "ordinary," the word "revenue" as used in the Appropriation Act of 1915, declaring that "there is hereby appropriated out of the State Revenue Fund, to be applied to the support of the public schools of the State, one-third of the ordinary revenue paid into the State Treasury for the fiscal years from July 1, 1914, to June 30, 1916," means "the annual and current income of the State, however derived, which is subject to appropriation for general uses." This definition excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use, or income which is not required to be paid into the State Revenue Fund, but into a special fund, among which are the collateral inheritance tax, the money derived from license fees on motor vehicles, fees paid into the State Treasury to the credit of the Insurance Department Fund, and other funds of a similar sort.

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2. ———: ———: **As Used in Constitution.** The words "State revenue" used in section 7 of article 11 of the Constitution, requiring at least "twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools," refer back to the words "ordinary revenue of the State," used in section 6 of said article, for their definition; but neither expression affords a clear-cut guide as to what income of the State is included.
3. ———: **Means Ordinary Revenue.** The word "revenue" as used in the Constitution and in the Appropriation Act of 1915 is limited by the word "ordinary," for both instruments use the words "ordinary revenue" in referring to the appropriations for the support of the public schools; and every appropriation act since 1877, except that of 1895, has used either the words "ordinary State revenue" or "ordinary revenue;" and so historically and lexically the word "revenue" when used in connection with an appropriation for the support of public schools means "ordinary revenue"—that is, revenue or income arising from usual methods of taxation.
4. **ORDINARY REVENUE: Meaning.** The words "ordinary revenue," as used in section 6 of article 11 of the Constitution and in section 1 of the Appropriation Act of 1915, Laws 1915, p. 89, mean "the regular and usual annual income of the State, however derived, which is subject to appropriation for general public uses."
5. ———: **Administrative Interpretation and Practice.** The interpretation put upon the words "ordinary revenue" used in the Constitution and appropriation acts, for a long series of years, by the executive officers of the State upon whom the duty of interpretation is cast, and long acquiesced in by the Legislature, is, in the absence of other qualifying considerations, decisive; but where new sources of income have recently been provided by law, and there has been no uniformity of interpretation by such officers, the rule is of no aid.
6. ———: **Share of Public Schools: Taxes.** Under the Appropriation Act of 1915, appropriating "one-third of the ordinary revenue paid into the State Treasury" to the support of the public schools, one-third of all moneys received as taxes on real or personal property from county collectors, and one-third of the county foreign insurance tax, the private car tax and the express companies' tax, was properly applied to that purpose.
7. ———: ———: **Things Not Included.** But receipts from old bond and coupon accounts, from amounts refunded, from insurance on Federal Soldiers' Home, from sale of old furniture, from itinerant vendors' licenses, and from Fish Commissioner's

fund, are not ordinary revenue, and one-third thereof cannot be so applied.

8. ———: ———: **Warehouse and Grain Department Fees.** Only one-third of the net revenue left, after paying all operating expenses, of the money or fees collected by the Warehouse and Grain Department for the inspection of hay and grain, are appropriated by the words "ordinary revenue" to the public schools, since the department was not intended to be an earner of profits, but only to pay its own way.
9. ———: ———: **State as Trustee: General Rule as to Earnings.** The general rule should be that whenever a statute creating a department of government of this State provides, or whenever an appropriation act for the support of such a department contains a proviso, that the cost of maintaining and operating it shall be defrayed wholly from fees earned by it, and not otherwise, the State is, as to an amount equal to the cost of upkeep, a trustee merely of the moneys paid into the State Treasury, and its general revenue fund is entitled only to the surplus after deducting the operating expenses. As to all such departments the term "revenue" means net revenue.
10. ———: ———: **Compensation Not Dependent Upon Earnings.** But when the payment of operating expenses of any department of the State government is not dependent upon its earnings, and the earnings are required by express statute to go directly into the State Treasury, the gross sum of its earnings is to be considered as ordinary revenue. The earnings of the Public Service Commission, State Auditor and Secretary of State are ordinary revenue, since the statutes provide for the payment of the expenses of all those departments whether they earn fees or not, and that the fees earned by them are to be paid into the State Treasury.
11. ———: ———: **Interest.** Interest accruing to the State from moneys deposited in banks or other depositaries is to be considered "ordinary revenue," unless it arises from a special fund and by express statutory provision the interest is to be expended for the identical purpose for which the special fund from which it accrues is to be spent.
12. ———: ———: **Fines: Not Ordinary Revenue.** Fines paid into the State Treasury in pursuance to a judgment of the Supreme Court finding certain corporations guilty of a violation of the anti-trust laws, are revenue, but not "ordinary revenue," and the State Auditor is not required by an appropriation of one-third of the "ordinary revenue" to the support of the public schools, to apply them to that purpose.
13. ———: ———: **Insurance Department Fund.** Neither are the moneys which for some years have been intermittently

transferred from the "Insurance Department Fund" to the General Revenue Fund ordinary revenue, and no part of them is to be applied to the public schools. They are not annual or current revenue, are required to be paid into a special fund, and only the overflow reaches the State Revenue Fund, and then only in pursuance to an express and special act, passed, ordinarily, biennially.

14. ———: ———: **Factory Inspection Fund.** Neither the gross nor the net income from the Factory Inspection Fund is a part of the "ordinary revenue" appropriated to the support of the public schools, for the reasons: First, such income, or fees, go into a special fund, and the net amount is not paid into the General Revenue Fund in regular and annual payments, but biennially only; and, second, the fund is primarily devoted to the payment of the expenses of the department, and no excess of expenses over income can be made up from general revenue.
15. ———: ———: **Examiners Appointed by State Auditor.** Only the net earnings of the examiners appointed by the State Auditor to examine and audit the books of the several counties and divers State institutions, should be counted as "ordinary revenue," since the statute seems to contemplate that only the excess of their earnings, after their salaries are paid, is to pass to the State Revenue Fund.
16. ———: ———: **Other Sources of Income.** Having adopted as a guide the rule that "ordinary revenue" within the purview of the Appropriations Act of 1915 declaring that "one-third of the ordinary revenue paid into the State Treasury" during the biennial period are appropriated to the support of the public schools, means "regular and usual annual income of the State which is subject to appropriation for general public purposes," it is *held* that the entire income from certain specific sources enumerated is embraced within the act (whether arising from taxation or gross earnings); that the net (but not the gross) earnings of other departments enumerated are also included; and that certain other sources of income, which comes into the State Treasury biennially, or intermittently, also enumerated, are excluded.

Mandamus.

For judgment see opinion, page 422.

A. T. Dumm for relator.

(1) The terms "ordinary revenue," as used in section 6 of article 11 of the Constitution of 1875 and in the Appropriation Act of 1915 (Laws 1915, p. 89),

and "State revenue," as used in section 7 of article 11 of the Constitution, are synonymous, and include all receipts into the State Treasury to the credit of the revenue fund. Secs. 6 and 7, art. 11, Constitution 1875; Laws 1915, p. 89; Laws 1895, p. 18; 34 Cyc. 1691; United States v. Bromley, 12 How. (U. S.) 97; Bates v. Porter, 74 Cal. 224; People ex rel. v. Supervisors, 4 Hill (N. Y.), 23; People v. Railroad, 34 Barb. (N. Y.) 134; Iverson Brown's Case, 91 Va. 779; State ex rel. v. School Fund, 4 Kan. 268; Commonwealth v. Bailey, 3 Ky. L. R. 117; Brown v. Elder, 32 Colo. 535; United States v. Mayo, 1 Gall. 396; State v. Ewing, 22 Kan. 708; Donelson v. State, 3 Lea (Tenn.), 695; Yancey v. Mfg. Co., 33 Ga. 624; Lamar W. & E. L. Co. v. Lamar, 128 Mo. 202. (2) Section 7 of article 11 of the Constitution of 1875 is a mandate to the Legislature to appropriate not less than twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools. And the exclusion of the "interest and sinking fund" is the inclusion of all other receipts into the treasury to the credit of the revenue fund.

Robert Burkham, Attorney for the Board of Education of the City of St. Louis; *Gage, Ladd & Small*, Attorneys for the School District of Kansas City; *H. K. White*, Attorney for the School District of the City of St. Joseph; *Ed. D. Merritt*, Attorney for the School District of Springfield; *Kelsey & Cameron*, Attorneys for the School District of Joplin; *Mahan, Smith & Mahan*, Attorneys for the School District of Hannibal; *Charles E. Yeater*, Attorney for the School District of Sedalia; *A. G. Young*, Attorney for the School District of Webb City; and *Arthur B. Chamier*, Attorney for the School District of Moberly, *Amici Curiae*.

(1) The expression "ordinary revenue" employed in the Act of 1915 is necessarily equivalent to

the expression "State revenue" as used in article 11, section 7, of the Constitution. (2) "State revenue" includes inspection fees and the like whether this expression be considered, 1st, independently: *State ex rel. v. Ewing*, 22 Kan. 708; *United States v. Bromley*, 12 How. (U. S.) 88; *Van Sant v. Stage Co.*, 59 Md. 330; *Power & Conduit Co. v. Buffalo*, 131 App. Div. (N. Y.) 485; or, 2nd, in connection with the context: Art. 11, secs. 6, 8, Constitution.

FARIS, J.—This is an original proceeding by mandamus, brought by relator as State Superintendent of Public Schools, to compel respondent, as State Auditor, to set apart and certify for payment to the relator for the use of the public schools of the State, the sum of \$496,587.34, under the Act of February 12, 1915 (Laws 1915, p. 89), which required the State Auditor to ascertain and set apart one-third of the ordinary revenue for the support of the public schools.

The case is here upon the pleadings and an agreed statement of facts. The pleadings are conventional, and since no point is made touching them, we need not cumber the books with them. The agreed statement of facts, which we apprehend will be found sufficient to convey an understanding of the conditions and issues, runs thus:

"It is agreed that during the fiscal year ending June 30, 1915, there were paid into the State Treasury to the credit of the General Revenue Fund, the following sums from the different sources mentioned:

1. From county collectors (tax on real and personal property)	\$3,851,174 61
2. County foreign insurance tax.....	365,449 17
3. Private car tax	9,870 90
4. Express companies' tax	44,737 68
5. Notaries' commissions	12,336 00
6. Land Department fees	556 22
7. Fees earned in office of State Auditor.....	8,380 88
8. Fees earned by office of Secretary of State....	9,719 30

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9. Incorporation tax (fees paid by corporations upon their incorporation and upon their increase of capital stock).....	87,017 50
10. Fees from Excise Commissioner of city of St. Louis	42,462 00
11. Proceeds of sale of beer stamps	460,858 27
12. Interest received from State depositories.....	147,223 35
13. Sale of oil stamps (being fees from oil inspections)	150,466 80
14. Interest on deposit of fees by St. Louis Excise Commissioner	47 17
15. Interest on deposit of Fish Commission.....	18 74
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals	3,573 62
17. Fees collected by Excise Commissioners of St. Louis county	3,713 02
18. Receipts from sale of laws	2,018 50
19. Receipts from old bond and coupon account....	15,270 43
20. Receipts from amounts refunded	36,032 06
21. Receipts from fines assessed against lumber companies for violation of Anti-Trust Act.....	252,728 65
22. Receipts from fees of Poultry Experiment Station	5,280 96
23. Receipts from fees of Warehouse and Grain Department	127,123 37
24. Moneys earned by State Auditors' Examiners...	6,702 08
25. Receipts from insurance on Federal Soldiers' Home	2,308 92
26. Receipts from sale of old furniture.....	165 00
27. Receipts for Itinerant Vendors Licenses.....	25 00
28. Receipts from fees of Bureau of Labor.....	2 07
29. Receipts from fees of Board of Agriculture....	25 00
30. Receipts from fees of Fruit Experiment Station	299 72
31. Receipts from Fish Commissioner's refund.....	301 05
32. Transferred from Insurance Department Fund...	125,000 00
33. Transferred from Factory Inspection Fund.....	6,271 93
34. Transferred from Text-Book Fund.....	990 00
35. Receipts from fees of Public Service Commission	36,946 87

“The aggregate of the items enumerated above, numbered 1, 2, 3 and 4, is \$4,271,232.36. The respondent, State Auditor, did on July 3, 1915, set apart and certify to the relator one-third of said sums, that is to say, \$1,423,744.12, as the total amount to be ap-

portioned by relator for the benefit of the public schools of the State.

"The respondent, as State Auditor, and his predecessors in said office, have continuously annually for many years prior to the present year, set apart and certified to the relator and the predecessors of the relator in the office of State Superintendent of Public Schools, in addition to one-third of the moneys derived from the first four sources above mentioned, one-third also of the moneys derived from the following sources, to-wit:

5. Notaries commissions.
6. Land Department fees.
7. Fees earned in office of State Auditor.
8. Fees earned by office of Secretary of State.
9. Incorporation tax.
10. Fees from Excise Commissioner of city of St. Louis.
11. Proceeds of sale of beer stamps.
12. Interest received from State depositaries.
13. Sale of oil stamps.
14. Interest on deposit of fees by St. Louis Excise Commissioner.
15. Interest on deposit of Fish Commission.
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals.
17. Fees collected by Excise Commissioners of St. Louis county.

"That the moneys derived from said sources, numbered 5 to 17, both inclusive, and paid into the State Treasury to the credit of the General Revenue Fund during the year ending June 30, 1915, amounted in the aggregate to \$926,372.87, no portion of which has been set apart and certified by respondent as State Auditor to the relator, for the year ending June 30, 1915.

"Neither the respondent, as State Auditor, nor any of his predecessors in said office, have heretofore set apart or certified to the relator or his predecessors in the office of Superintendent of Public Schools, any portion of the moneys derived and paid into the State Treasury to the credit of the General Revenue Fund from the following sources:

18. Receipts from sale of laws.
19. Receipts from old bond and coupon account.
20. Receipts from amounts refunded.
21. Receipts from fines assessed against lumber companies for violations of Anti-Trust Act.
22. Receipts from fees of Poultry Experiment Station.
23. Receipts from fees of Warehouse and Grain Department.
24. Moneys earned by State Auditors' Examiners.
25. Receipts from insurance on Federal Soldiers' Home.
26. Receipts from sale of old furniture.
27. Receipts from Itinerant Vendors' Licenses.
28. Receipts from fees of Bureau of Labor.
29. Receipts from fees of Board of Agriculture.
30. Receipts from fees of Fruit Experiment Station.
31. Receipts from Fish Commissioner's refund.
32. Transferred from Insurance Department Fund.
33. Transferred from Factory Inspection Fund.
34. Transferred from Text-Book Fund.
35. Receipts from fees of Public Service Commission.

"Some of the laws from which these moneys were derived and paid into the State Treasury are of comparatively recent enactment, as will be pointed out in the briefs to be filed.

"The relator here expressly waives and abandons any claim to a setting apart or a certificate to him by respondent of any part of the moneys derived from the sources now to be mentioned and already referred to in this statement by numbers, as follows:

19. Receipts from old bond and coupon account.
20. Receipts from amounts refunded.
25. Receipts from insurance on Federal Soldiers' Home.
26. Receipts from sale of old furniture.
27. Receipts from Itinerant Vendors' Licenses.
31. Receipts from Fish Commissioner's refund.

And it is agreed that the relator's petition be taken and regarded as amended by striking out any claim to a setting apart of moneys derived from any of the sources last mentioned.

"After excluding from consideration the moneys derived from the six sources last mentioned (claim to which is now abandoned), the moneys derived from the other sources mentioned (no part of which has ever

been set apart and certified by State Auditors for the benefit of the public schools), and paid into the State Treasury to the credit of the General Revenue Fund, amount to the sum of \$563,389.15.

“The moneys paid out for salaries and expenses of the Warehouse and Grain Department during the period mentioned, were \$96,491.42. The receipts of said department were \$127,123.37.

“The sum paid out of the State Treasury for the support (salaries and expenses) of the Public Service Commission during the year mentioned were largely in excess of the fees paid into the State Treasury and earned by said commission.

“The same is true as to the proceeds of the sale of laws; the expense of publishing the laws being greater than the amount received from the sale.

“The expense of maintaining the Poultry Experiment Station, which is paid out of the State Treasury, is largely in excess of the fees received on that account.

“The same is true of salaries and expenses connected with the Department of Labor; the Board of Agriculture and the Fruit Experiment Station; in each case the expense of maintaining each one of these departments, which is paid out of the State Treasury, is in excess of the fees received from them respectively.

“The amount of the salaries, wages and expenses of the State Auditors' Examiners, which were paid by the State, was substantially the same as the moneys paid into the State Treasury on account of the services of said examiners.

“The one hundred and twenty-five thousand dollar (\$125,000) item, numbered 32 in this statement, ‘Transferred from Insurance Department Fund,’ was so transferred by virtue of section 55a, an act with the heading: ‘Appropriations; contingent and inci-

dental expenses for the years 1915 and 1916,' approved April 2, 1915, Laws 1915, p. 20.

"The Attorney-General wrote to the respondent, the State Auditor, the opinions set out in the return of the respondent.

"It is agreed that, prior to the filing of the petition for an alternative writ of mandamus, demand was made by relator upon respondent for the relief herein sought, and the same was refused; and that the petition shall be considered and taken as amended so as to show such demand and refusal.

"In the cases in which the figures shown in the petition as to the amount of moneys received from any source do not correspond with the figures contained in this agreed statement of facts, the petition is to be considered as amended to correspond to the agreed statement of facts.

"If the court shall be of the opinion that as to moneys derived from some of the sources mentioned in the relator's petition and claimed by him therein (and not herein waived and abandoned by him), the relator's claim as made in his petition to a setting apart and certification to him of a part thereof cannot be maintained, and shall be of the opinion that as to some of said moneys no part thereof should be set apart or certified by respondent to relator, it is agreed that as to such moneys and the claim thereof the petition of the relator shall be taken and considered as amended by striking out all claim on account of any said moneys, and the relator hereby asks that his petition be considered and regarded as amended in that respect; so that if the court shall be of the opinion that the relator is entitled to any part of the relief which he asks, he shall not be denied all relief for the reason that he has asked for more than he is entitled to."

OPINION

I. While we have not had the benefit of respondent's views, since regrettably and to the great increase of our labors, he has not seen fit to furnish us with a brief it is apodeictic that the controversy turns upon the construction to be placed upon section 1 of the Act of February 12, 1915, appropriating money out of the State Revenue Fund for the support of the public schools. [Laws 1915, sec. 1, p. 89.] This section reads thus:

Meaning
of Word
"Revenue."

"There is hereby appropriated out of the State Revenue Fund, to be applied to the support of the public schools of the State, one-third of the ordinary revenue paid into the State Treasury for the fiscal years from July 1, 1914, to June 30, 1916, which amount of said fiscal year apportionment shall be ascertained and set apart to said school moneys by the State Auditor, as is or may hereafter be provided by law."

It is likewise apparent that the controversy in its last analysis resolves itself into the single question: What is the meaning of the two words "ordinary revenue," as these words are used in the Legislative act, *supra*?

It is fairly clear, we think, that the word "revenue" is modified or limited by the use of the word "ordinary." The effect of this limitation we will discuss hereafter. Turning to the lexicons of the language we find that the word "revenue" means: "The annual yield of taxes, excise, customs, duties, rents, etc., which a Nation, State, or municipality collects and receives into the treasury for public use." [Webster's Int. Dict.] "The total current income of a government, *however derived*, subject to appropriation for public uses." [Standard Dict.] "The annual income of a State derived from the taxation, customs, excise, or other sources and appropriated to the payment of the national expenses." [Century Dict.]

These definitions have met the approval of the courts, as will be noted by an examination of the below cases: *Fletcher v. Oliver*, 25 Ark. 289; *Bates v. Porter*, 74 Cal. 224; *United States v. Norton*, 91 U. S. 566; *State v. School Fund Commrs.*, 4 Kan. 261; *Vansant v. Harlem Stage Co.*, 59 Md. 330; *State ex rel. v. Ewing*, 22 Kan. 708; *United States v. Bromley*, 53 U. S. 88; *People's U. S. Bank v. Goodwin*, 162 Fed. 937; *In re Magnes Est.*, 32 Colo. 527.

In the case of *State ex rel. v. Ewing*, *supra*, at page 712, the Supreme Court of Kansas, in an opinion by Judge BREWER, sometime judge of the Supreme Court of the United States, said:

"The Act of 1879 is entitled, 'An act to provide revenue,' etc. Now how broad is the term 'revenue,' and what may be included in such a title? Does it mean simply funds raised by taxation, and is the levying of taxes all that may be included? Such would seem to be the views of the counsel for the State, but we cannot think them correct. One of the definitions given by Webster of the term is, 'the annual produce of taxes, excise, customs, duties, rents, etc., which a Nation or State collects and receives into the treasury for public use.' The word is broad and general, and includes all public moneys which the State collects and receives, from whatever source and in whatever manner. The general funds of this State are collected from taxes, but the Legislature might, in an act with such a title—at least, so far as any question of the form of the legislation is concerned—enact that they be collected from licenses, or from the sale of lottery tickets, or it might unite and enact that part might be collected from one source and in one manner, and the rest from another source and in a different manner."

In the case of *United States v. Bromley*, *supra*, at page 96, the Supreme Court of the United States said:

“That the act which prescribes the offense charged is a revenue law, there would seem to be no doubt. In its title, it is declared to be an act to reduce the rates of postage, and for the ‘prevention of frauds on the revenue of the Post-Office Department.’ In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudulent acts which lessen it. Under the Act of 1836, the revenue of the Post-Office Department is paid into the Treasury. Revenue is the income of a State, and the revenue of the Post-Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports.”

The various definitions of this word as collated and summarized by Cyc. are as follows:

“The annual product of taxes, excise customs, duties, rents, etc., which a Nation or State collects and receives into the Treasury for public use; the yearly income of a government or a person natural or artificial, from the property belonging to such government or person; the income of the State; the income which a State collects and receives into its Treasury and has appropriated for the payment of its expenses; the product or fruit of taxation; the income of the government arising from taxation, duties and the like; the annual profits of taxes, excise, customs duties, rents, etc., which a Nation or State collects and receives into the Treasury for public use; the income of the State or Nation derived from the duties and taxes and other sources for the payment of the national expenses.” [34 Cyc. 1691.]

Clearly the word “revenue” is broader than and includes taxation, as well as all other sources of municipal income. Revenue may be said to be the genus, while taxation is but a species. We are convinced

therefore that the word "revenue," as used in the appropriation act under discussion, when standing alone, and when not modified by the word "ordinary" (which we shall later discuss, when we come to sum up our conclusions), means: *The annual and current income of the State, however derived, which is subject to appropriation for general public uses.* This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use, or which is not required to be paid into the State Revenue Fund, but into a special fund, e. g., the collateral inheritance tax, specifically collected for the support of the State University and its departments (Sec. 312, R. S. 1909); the money derived from license fees on motor vehicles (Laws 1911, p. 331, sec. 13); fees paid into the State Treasury to the credit of the "Insurance Department Fund" (Sec. 6884, R. S. 1909); and others of similar sort. Color is lent to this view not alone by the lexical meaning of the word revenue and by its construction by respectable and high courts, but by the very language of our Constitution, which enjoins upon the Legislature the making of this appropriation for the support of the public schools, and which reads thus:

"In case the public school fund now provided and set apart by law, for the support of free public schools, shall be insufficient to sustain a free school at least four months in every year in each school district in this State, the General Assembly may provide for such deficiency in accordance with section eleven of the article on revenue and taxation; but in no case shall there be set apart less than twenty-five per cent of the *State revenue, exclusive of the interest and sinking fund*, to be applied annually to the support of the public schools."

Further light is cast upon this view by the provisions of section 6 of article 11 of the Constitution,

which, after naming divers sources from which funds for the support of the public schools of the State should be derived, couples itself by language *in pari materia* with section 7, *supra*, by providing, among other things, that certain named funds from the several sources in the section designated, "*together with so much of the ordinary revenue of the State as may be by law set apart for that purpose*, shall be faithfully appropriated for establishing and maintaining the free public schools," etc. [Italics ours.] Confessedly, however, when we concede that the expressions used are *in pari materia* and therefore in a way synonymous, we are met by the doubt whether they each mean "State revenue," or each mean "ordinary revenue of the State." The latter expression is first used in the article; the former merely refers back to the latter, logically we may say, for the definition of the words "State revenue" as latterly used. So, no comfortable short-cut can with logical consistency, be found in the Constitution. For the Legislature, in nineteen appropriation acts, out of a total of twenty, has used the words "ordinary State revenue," or "ordinary revenue," as used in said section 6, instead of the language in section 7 of the Constitution; notwithstanding the last-named section is the one which specifically enjoins upon the Legislature the duty of appropriating as much as one-fourth of the State revenue for the support of the public schools.

II. From 1877, when for the first time it became the Legislature's Constitution-enjoined duty to appropriate "at least twenty-five per cent of the State revenue, exclusive of the interest and sinking fund," to the support of the public schools, till 1887, the Legislature of this State biennially set apart "*one-fourth of the ordinary State revenue paid into the treasury*" for the support of the public schools; using in making such appropri-

Language of
Prior Acts.

ation the language we italicise above. [Laws 1877, p. 12; Laws 1879, p. 3; Laws 1881, p. 3; Laws 1883, p. 4; Laws 1885, p. 4.] In 1887 "one-third of the ordinary State revenue" was for the first time appropriated for the support of the public schools of this State. Biennially since, one-third, instead of one-fourth, of the ordinary revenue has been by the Legislatures of this State so set apart. Likewise in the years 1887, 1889 and 1891, the language of the Appropriation Act was "ordinary State revenue." [Laws 1887, p. 4; Laws 1889, p. 12; Laws 1891, p. 24.] For the first time in 1893, and ever since, *barring one exception, that of the Act of 1895*, below discussed, the words used in making this appropriation have been simply "ordinary revenue." [Laws 1893, p. 19; Laws 1897, p. 21; Laws 1899, p. 24; Laws 1901, p. 19; Laws 1903, p. 22; Laws 1905, p. 26; Laws 1907, p. 38; Laws 1909, p. 50; Laws 1911, p. 72; Laws 1913, p. 82; Laws 1915, p. 89, already set out *verbatim*, supra.] In 1895 the Legislature in making this appropriation used the words "*one-third of all moneys paid into the State Treasury for the years 1895 and 1896 to the credit of the State Revenue Fund.*" [Laws 1895, p. 18.] It is urged that the expression used, to-wit, "one-third of all the moneys paid . . . to the credit of the State Revenue Fund," is highly significant. We do not so regard it. For the "one-third of all the moneys" is limited by the requirement that such moneys shall be from the "State revenue;" and the question here largely vexing us is, What moneys of the State are included in the expression "State revenue," and what is meant thereby? We would grant the contention if the language of the act had been simply "one-third of all the moneys paid into the State Treasury," and had, as it did not, stopped there. But this is not important. At most it is but a straw in the wind, only infinitesimally meet in determining direction.

III. We conclude then that both lexically and historically the definition given above of the word "revenue" as used in the statute under discussion, is reasonably correct. But as this word appears both in the appropriation act here confronting us and in the Constitution (Sec. 6, art. 11, Constitution 1875), it is clearly limited by the word "ordinary." We are not warranted in casting this word out, but must use it and give a meaning to it, if to do so will not defeat the legislative intent, or render the statute and organic law absurd or meaningless. [Strotzman v. Railroad, 211 Mo. 227; State ex rel. v. Harter, 188 Mo. 516.]

As words when used by the people in their Constitution, and by the Legislatures in their statutes; are ordinarily to be construed to be used in their ordinary sense (Sec. 8057, R. S. 1909), again recourse must be had to the dictionaries. From these we find the word "ordinary" means in its adjectival use as it occurs in the act before us: "*According to established order; settled, regular.*" It is a synonym of "normal, common, customary, usual." Its antonyms are: "Extraordinary, unusual, uncommon." Taking the two words together, then, as they occur both in our Constitution and in the appropriation act before us, and being guided by both their lexical and legal meanings, as well as the construction urged on us by the necessity for formulating a fixed and general rule, we conclude that the words "ordinary revenue," as used in said section 6, article 11, of the Constitution and in the act under discussion (Sec. 1, p. 89, Laws 1915), mean: *The regular and usual annual income of the State, however derived, which is subject to appropriation for general public uses.*

IV. Keeping this construction of the meaning of "ordinary revenue" before us, there is no mountain-

ous difficulty in deciding the concrete facts here vexing us. The controversy for the most part, we think, becomes fairly plain. The trouble lies in steering a legal, logical and sensible course through the bewildering maze of diverse statutes which created departments of the State government, the operating of some of which is carried on at a total or partial loss and others of which produce either gross or net incomes to the State, and of formulating a fixed rule of construction, applicable to all these diverse conditions, which will serve to obviate the thick and excusable uncertainty heretofore and now prevailing.

If we should grant that *as a matter of law*, the words "ordinary revenue" are ambiguous—a thing we cannot bring ourselves to concede—we could, if the above conditions presented all of the facts and showed all of the difficulties, very readily (if there were not other and additional items in dispute) and speedily settle this case by invoking the well-recognized rule of statutory construction, that the meaning put upon the words of these many similar appropriation acts by the executive officers of the State upon whom the duty of interpretation falls, is of great weight, and absent other qualifying considerations, decisive (*Schawacker v. McLaughlin*, 139 Mo. 333; *Darling v. Potts*, 118 Mo. 506; *Ross v. Railroad*, 111 Mo. 18; *Barber Asphalt Paving Co. v. Meservey*, 103 Mo. App. 186); especially when coupled with the passive acquiescence of the Legislature for almost forty years. But other items, to-wit, those numbered 18, 21, 22, 23, 24, 28, 29, 30, 32, 33, 34 and 35, are likewise in dispute here. As to these items we gather from the record and judicially notice from the public biennial reports of the State Auditor there has been no uniform practice in the office of the State Auditor. Some years some of these items last above were included; and in other years they, or some of them formerly taken into account, were omitted, and others of them used. So great was

the doubt and uncertainty in this behalf existing that it caused the discrepancy to be pointed out by a special legislative committee having in charge the examination of the various State offices.

In the light of this latter condition we cannot say that executive interpretation, long acquiesced in by the Legislature, aids us; for the very simple reason that *there has been no uniformity in interpretation by such executive officers*, and conduct seeming to be legislative acquiescence is found to be passive non-interference with changing methods wholly lacking uniformity. It is plain then that we are not aided and cannot be aided by invoking any rule of construction made for us by executive interpretation through a long course of years.

V. It appears from the record that moneys accruing from items numbered 1, 2, 3 and 4, to-wit:

1. From county collectors (tax on real and personal property);
2. County foreign insurance tax;
3. Private car tax;
4. Express companies' tax;

aggregating \$4,271,232.36, are not in dispute; that in pursuance of a uniform custom, the respondent, as

both he and his predecessors in office have

Taxes. always done, set apart and certified on July 3, 1915, for the use of the public schools, the sum of \$1,423,744.12. So with these items, since there is no dispute here about them or about this sum, and since we think the course taken as to them is undoubtedly correct, we need not concern ourselves further.

Items numbered 19, 20, 25, 26, 27 and 31, to-wit:

19. Receipts from old bond and coupon account;
20. Receipts from amounts refunded;
25. Receipts from insurance on Federal Soldiers' Home;
26. Receipts from sale of old furniture;
27. Receipts from itinerant vendors' licenses;
31. Receipts from Fish Commissioner's Refund;

are abandoned by relator. He concedes that the public schools are not, under the terms of the act under discussion, entitled to one-third of any of the items last above. Therefore we dismiss them from our discussion.

Items numbered 5 to 17, both inclusive, to-wit:

5. Notaries' commissions.
6. Land Department fees.
7. Fees earned in office of State Auditor.
8. Fees earned by office of Secretary of State.
9. Incorporation tax.
10. Fees from Excise Commissioner of city of St. Louis.
11. Proceeds of sale of beer stamps.
12. Interest received from State depositaries.
13. Sale of oil stamps.
14. Interest on deposit of fees by St. Louis Excise Commissioner.
15. Interest on deposit of Fish Commission.
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals.
17. Fees collected by Excise Commissioners of St. Louis county.

are, however, in dispute here. The agreed case as to them shows that both respondent and his predecessors in the office of State Auditor have for many years uniformly, until this year, set apart one-third of all State income arising from each of the last above several items, under authority conferred by appropriation acts couched in precisely similar verbiage to that here under discussion.

Items numbered 18, 21, 22, 23, 24, 28, 29, 30, 32, 33, 34 and 35, to-wit:

18. Receipts from sale of laws.
21. Receipts from fines assessed against lumber companies for violations of Anti-Trust Act.
22. Receipts from fees of Poultry Experiment Station.
23. Receipts from fees of Warehouse and Grain Department.
24. Moneys earned by State Auditors' Examiners.
28. Receipts from fees of Bureau of Labor.
29. Receipts from fees of Board of Agriculture.
30. Receipts from fees of Fruit Experiment Station.
32. Transferred from Insurance Department fund.
33. Transferred from Factory Inspection fund.
34. Transferred from Text-Book Fund.
35. Receipts from fees of Public Service Commission.

are likewise in dispute. None of said items last above has been uniformly taken into account in setting apart moneys from general revenue for the support of public schools by either respondent or any of his predecessors. Thus stands the controversy, and so we come to consider specific matters and funds in dispute.

VI. The question whether "ordinary revenue" includes the whole of the \$127,123.37 of gross earnings of the office of Warehouse Commissioners, or whether it includes only the net earnings (the sum of \$30,631.95) of such office after deducting aggregate sums paid out of the State Treasury for salaries and contingent expenses for upkeep, presents much difficulty. No consistent course has been pursued by the Legislature in dealing with this department. This makes it well nigh impossible for us to deduce a consistent rule touching the fees of this department. In 1913 the whole of article 2 of chapter 60, Revised Statutes 1909, which provided theretofore for the inspection of hay and grain, was repealed and a new act *in toto* was passed (Laws 1913, pp. 354-373), which of course, is now the law. That this department was not intended to be an earner of profits, but merely to pay its own way, appears conclusively from the terms of the act itself, which provides that the charges fixed by the Warehouse Commissioner for services rendered "shall be regulated in such manner as will, in the judgment of the commissioner, produce sufficient revenue to meet the necessary expenses of the service of inspection and no more." [Sec. 41, p. 367, Laws 1913.] This view is accentuated by the language of the section of the act appropriating money for the support of this department for the years 1913 and 1914 (the earning for six months of which latter year are here in controversy). After setting out the amounts appropriated, it is further provided in the act "that no more [mon-

Warehouse
Department.

ey] shall be drawn against the appropriation than has been paid into the treasury by said department, the intention being that the above-named department shall support itself out of its fees made and turned into the treasury." [Laws 1913, p. 9, sec. 12b.] While there is no such condition specifically attached to the appropriation for this department for the years 1915 and 1916, so far as we have been able to find, yet the condition set out in the Act of 1913, in intent, only follows the terms of the act creating the department. [Sec. 41, Laws 1913, p. 367, supra.] Therefore, while conceding that by reason of the inconsistency of treatment of this department by the Legislature, we are unable to bring it strictly within the definition we formulate, we conclude that only the net sum, after deducting operating expenses, should be here taken into account. So much only can we gather of the intent of the Legislature from its acts. If the intent be otherwise, the language next used by the Legislature can clarify the point beyond dispute. Indeed, here for a period of six months, the case falls exactly within our rule. We are unable from the facts before us to segregate the earnings of this period from those of the other six months in controversy. For these reasons we take into account from this item, the sum of \$30,631.95 only, same being net revenue left after the payment of all operating expenses.

The general rule by which departments like the above are to be measured, would seem to be that:

**Net Earnings
of a Department.**

Whenever a statute creating a department of government of this State provides (or whenever an appropriation for the support of a department of government contains such a proviso) that the cost of operation shall be defrayed wholly from fees earned by such department and not otherwise, then clearly the State is, as to an amount equal to the cost of upkeep, a trustee merely of the moneys paid in, and the State's general

revenue fund in entitled only to the surplus paid in to the State Treasury after deducting expenses of the operation of such department. For strictly speaking, in such case the appropriation is not made out of the general revenue of the State, but out of the earnings of the department. By the very terms of the attached condition, the officers would not be paid in full, or at all if no fees were earned (e. g., Hay and Grain Inspection Department, Laws 1913, p. 367, sec. 41, Laws 1913, p. 9, sec. 12b; Text-Book Filing Fund, sec. 10955, R. S. 1909). So to all such the term "revenue" means net revenue. This in fact is the present rule by statute as to the fees of the clerk of this court and likewise as to the fees of the clerks of the several Courts of Appeals.

As to other departments and the earnings thereof, when payment of operating expenses is in no wise conditioned upon earnings, and which earnings go directly by express statute into the State Treasury, the gross sum of earnings is to be considered ordinary revenue, e. g., earnings of the Public Service Commission; earnings of the Secretary of State (sec. 10718, R. S. 1909); earnings of the State Auditor (sec. 1276, R. S. 1909), etc. This for the reason that the statutes provide for the payment of the expenses of all of these departments whether they earn fees or not, and because all of such fees earned by the former (Laws 1913, p. 567, sec. 21) as well as those earned by the two latter, are by statutes required to be paid into the State Treasury (secs. 10716, 10717, 10718, R. S. 1909) to the credit of the revenue fund.

VII. It is patent that interest accruing to the State from moneys deposited in banks, or other State depositaries, is to be considered as "ordinary revenue" within the purview of the appropriation act under discussion, and in the light

Earnings of Auditor, Etc.

of our construction of the words "ordinary revenue," supra, save and except in such cases (if such there be) wherein the interest accrues from a special fund, and by express provision of law is required to be expended for the identical purpose of the special fund, from which it accrued. [Cf. Act. of March 24, 1911, sec. 10, p. 114, Laws 1911.]

VIII. From the rules which we are impelled to formulate from our view of the law, we are of opinion that the fines assessed against the Arkansas Lumber Co. and others in the suit of State ex inf. v. Arkansas Lumber Co., 260 Mo. 212, are not to be taken into account but wholly excluded. (Such fines have never been taken into account heretofore in this behalf by any State Auditor.) This, for the reason that while it is undoubtedly revenue, it is not *ordinary* revenue, because it is not annual or current, but wholly adventitious and in the nature of a "windfall," if we may use an horticultural expression.

Likewise item 32, the same being the moneys which have been intermittently, for some years prior, and which were, by act of the last Legislature, transferred from the "Insurance Department Fund" to the general revenue fund, is not to be taken into account. This for the reasons that these moneys are not annual, or current revenue; and because they are required to be paid into a special fund (Sec. 6884, R. S. 1909) and because only the "overflow" from this fund reaches the State revenue fund, and *then only pursuant to an express and special act passed*, ordinarily, biennially, transferring a portion of such fund to State revenue. [Laws 1915, sec. 55a, p. 20; Laws 1913, sec. 79, p. 30.] We say "ordinarily biennially," for the reason that we have been unable to find any general statute making such transfer mandatory upon each or any Leg-

islature, and note that no such transfer was made in 1905, or in 1895. This item has never been included heretofore.

IX. Neither the gross income, nor the net income, from the Factory Inspection Fund should be taken into account, for the reasons: (a) such income, **Factory Inspection.** or fees, go into a special fund, viz.: "the Factory Inspection Fund," and are not annually paid into general revenue; (b) this fund is primarily to be devoted to the payment of the expenses of the Factory Inspection Department, and no excess of expense over income of the department can be made up from general state revenue, and (c) the income to the general revenue fund of the State, if any, is not paid in regular and usual *annual* payments, but biennially only. [Sec. 7826, R. S. 1909.]

X. The question of whether the earnings of the examiners appointed by the State Auditor and whose duty it is to examine and audit the books of the several counties and of divers state institutions, in the act more specifically set out (Laws 1913, pp. 765 et seq.), presents much of difficulty. Clearly this branch of the Treasury Department is not designed to be an earner of revenue; neither has it earned any, for the agreed facts show that the income therefrom in the biennial period here under discussion was substantially equal to the expense thereof. Pertinent parts of the statute creating this department provide thus:

"The examiner making such examination shall make out his account under oath and forward same in duplicate to the State Auditor, one copy of which shall be filed in the office of the State Auditor and the other forwarded by the State Auditor to the county court of said county or the proper officers of the city of St. Louis, who shall draw a warrant at their first meeting in payment of same and remit said amount to the examiner making the examination, addressed

to Jefferson City, Mo., in care of the State Auditor: Provided, that any of the regularly appointed examiners whose time is spent in the auditing of accounts of any county and receives a *per diem* of \$7.50 for same, the amount so received from the county shall be deducted from the \$2,000 authorized by this act to be paid to him from the public treasury, in order that in no case shall an examiner's salary be in excess of \$2000; and provided further, that whenever the *per diem* of any regular examiner exceeds the amount of \$2000, the salary allowed him by this act, the excess, if there be any, shall be paid into the State Treasury to the credit of the State Revenue Fund." [Laws 1913, p. 767, sec. 5.]

In substantial accordance with the rules of construction which we have reached and laid down, we hold that this item should not be taken into account in this action, but net income therefrom, if any such there may hereafter be, should be included.

XI. It follows, then, that all of the items 5 to 17, to-wit:

5. Notaries' commissions;
6. Land department fees;
7. Fees earned in office of State Auditor;
8. Fees earned by office of Secretary of State;
9. Incorporation tax;
10. Fees from Excise Commissioner of city of St. Louis;
11. Proceeds of sale of beer stamps;
12. Interest received from State depositaries;
13. Sale of oil stamps;
14. Interest on deposit of fees by St. Louis Excise Commissioner;
15. Interest on deposit of Fish Commission;
16. Excess fees from clerk of Supreme Court, clerk of St. Louis Court of Appeals, clerk of Springfield Court of Appeals, clerk of Kansas City Court of Appeals;
17. Fees collected by Excise Commissioners of St. Louis county;

both inclusive, are to be taken into account and included in "ordinary revenue" within the purview of the statute in dispute; for the reasons that said

items 5, 6, 7, 8, 9, 10, 11, 13, 16 and 17 are clearly "regular and usual annual income of the State . . . which is subject to appropriation for general public purposes." Moneys are derived from these several items every year. These several sums are paid into the general treasury of the State for the revenue fund, pursuant to general laws, and subject to no restrictions limiting their application; items 12, 14 and 15, *supra*, because they each represent interest paid upon deposits of State moneys, absent a statute requiring such interest to follow in use a specifically restricted principal.

That items 18, 22, 28, 29, 30 and 35, to-wit:

18. Receipts from sale of laws;
22. Receipts from fees of Poultry Experiment Station;
28. Receipts from fees of Bureau of Labor;
29. Receipts from fees of Board of Agriculture;
30. Receipts from fees of Fruit Experiment Station;
35. Receipts from fees of Public Service Commission:

and the *net income* of fees from items 23 and 34, to-wit, the Warehouse and Grain Inspection Department, and the Text-Book Filing Fund, are likewise to be so included. What we say last above forms, we think, a sufficient reason for so including items 18, 22, 28, 29, 30 and 35. Our views and reason for excluding the gross income, but for including the net income, of the last above several items numbered 23 and 34 have been herein before set out at length.

All other items in dispute, since they do not fall within the purview of the definitions and conclusions reached by us and discussed either specifically or generally hereinabove, are to be excluded. While on first blush an apparently though not really arbitrary rule may seem to be invoked as to such items as come into the general revenue fund of the State biennially only (e. g., Factory Inspection Fund), or biennially, but intermittently, and by virtue of an express special act (e. g., transfer from Insurance Department Fund),

or occasionally and adventitiously (e. g., fines accruing from prosecutions of lumber companies, State ex inf. v. Arkansas Lumber Co. et al., 260 Mo. 212), yet upon more careful thought and consideration it will be seen that a crying necessity exists for a general rule to use in setting apart this fund, which will forever dissipate the dark obscurity which has heretofore befogged it, and that no such rule can be logically formulated, which will serve to measure all cases, if these items are to be included. This is the administrative difficulty; if it be wrongly resolved a word from the Legislature can correct it. Besides, it may well be that these rules which we have formulated as the only consistent interpretation of the legislative intent derivable from the language of the appropriation act under discussion, will serve to obviate fat and lean years in public school revenues, and that it was so intended. That those in charge of such schools may confidently rely upon a fairly fixed and stable income, and that they may not be induced to lavish and waste funds this year and be forced to a too lean and scrimping economy next year, is a *desideratum* to be wished for. The conclusions here reached bring this to pass and are yet, we think, in line with the law both here and elsewhere. The rule allows full latitude for a growth of the State, a condition fully demonstrated by the fact that the amount below set apart from State revenues for the support of the public school system exceeds by many thousands of dollars any appropriation for any one year ever before so devoted, from this source.

Amending the petition (which by stipulation stands as and for the alternative writ, issuance of which was waived), as provided by the agreed facts, we eliminate all items except as last above enumerated and found to be within the purview of the appropriation act and award the writ as to such items.

It is therefore our order that our peremptory writ go for the sum of \$334,189.31, being the aggregate of

the one-third part of the items aforesaid, and making, with the sum already set apart and certified by respondent for the use of the public schools for the fiscal year 1915, a grand total of \$1,757,933.43. Let our peremptory writ so issue. All concur.

THE STATE ex rel. SOUTHERN NATIONAL
BANK OF KANSAS CITY v. JAMES ELLISON
et al., Judges of Kansas City Court of Appeals.

In Banc, December 22, 1915.

1. **PRACTICE: Motion to Dismiss: Equal to Demurrer.** The legal character of a pleading is to be determined by its substance, and not by its name. A motion to strike out or to dismiss may fill the office of a demurrer, and be so treated, where it is, to all intents and purposes, a demurrer, and dispositive of the whole case, as a matter of law.
2. ———: ———: **Evidence: Appeal: No Motion for New Trial.** Where one ground of a motion to dismiss as to movents was that the record shows on its face that if plaintiff ever had a right to establish a mechanic's lien on their property such right had expired, and that part of the motion only is sustained, and an appeal is taken by plaintiff from that judgment to the Court of Appeals, that court, having otherwise appellate jurisdiction in the matter, cannot refuse to consider the point raised by the motion upon the ground that it required a motion for new trial to preserve the point for review. No motion for a new trial was necessary, nor did a proper determination of the point put in issue require an examination of the evidence, nor was evidence necessary or even proper. Things appearing on the face of the record conclusively speak for themselves.
3. ———: ———: ———: ———: ———: **Other Grounds of Motion.** Nor does the fact that the motion to dismiss contained other grounds, which could be sustained only by evidence, and that evidence was offered in support of them, and they were not sustained, alter the right of the plaintiff on appeal, without any motion for a new trial filed in the trial

court, to have that part of the motion charging that the amended petition showed on its face that plaintiff's right to a mechanic's lien had expired, and which was separately sustained, considered by the appellate court—not even though movents had done the useless thing of supporting the point by evidence.

4. ———: ———: **Grounds Assigned.** On appeal the court must presume that the trial court sustained a motion to dismiss on the ground specifically assigned by it—in this case, that a motion to dismiss is sustained on the "first ground" assigned in that motion, which was that the petition showed on its face that the right to a mechanic's lien sought by it had expired.
5. ———: ———: **Where No Ground Is Assigned.** Where the motion to dismiss assigns several grounds, one of which is to the effect that the petition shows on its face that the action is barred, and others which call for evidence to establish them, and the motion is sustained without any assignment of the ground therefor, then on appeal by plaintiff he cannot rely solely upon the disclosures of the record proper, because, as long as the motion went both to the record proper and matters of exception, the appellate court will indulge the presumption that the trial court decided correctly, if not upon the disclosures of the record proper, then upon the matters of exception alleged in the motion, there being no motion for a new trial and hence no evidence preserved for review. But where the trial court sustains the motion on the specific ground that the record shows on its face that the action is barred, then that point is for consideration in the appellate court, without any motion for a new trial.

Certiorari.

JUDGMENT QUASHED.

Ellis, Cook & Barnett for relator.

(1) The reinstatement of the case as to the defendants McDermand at the same term of court at which it had been dismissed put the case back precisely where it was before the order of dismissal was made. *Brown v. Foote*, 55 Mo. 178; 14 Cyc. 460, 465; *Miller v. Earl*, 15 S. W. 916; *Crane Co. v. Hawley*, *Keragham & Co.*, 54 Mo. App. 603; *West v. McMullen*, 112 Mo. 409; *State to use v. Kessler*, 15 Mo. App. 590; *Salt Co. v. Baldrige*, 53 Kan. 532; *Wolters v. Rossi*,

126 Cal. 644; Zitnick v. Railroad, 145 N. W. 344; Duty v. Railroad, 73 S. E. 331. (2) The expiration of the term of court at which the order was made requiring an amendment of the plaintiff's petition, did not, even though no such amendment was made during the term, affect a judgment in favor of the defendants McDermmand. Robinson v. County Court, 32 Mo. 428; Berry v. Zimmerman, 43 Mo. 215; Plattsburg v. Allen, 84 Mo. App. 432; Ruch v. Jones, 33 Mo. 393; Louthan v. Caldwell, 52 Mo. 121; Cooney v. Murdock, 54 Mo. 349; Briggs v. Block, 18 Mo. 281; Davis v. Carp, 139 Mo. App. 650. (3) The reinstatement of the case and the order permitting plaintiff to file its amended petition out of time were matters within the sound discretion of the court. 14 Cyc. 460; Crane v. Hawley, Keraghan & Co., 54 Mo. App. 603; Cooney v. Murdock, 54 Mo. 349; Davis v. Carp, 139 Mo. App. 650, l. c. 654; State v. Bird, 22 Mo. 470; Phillips v. Ayerck, 84 Ga. 725; Combs v. Steele, 80 Ill. 101; Chichester v. Hastie, 9 S. C. 330; Gunnersell v. Boyle, 7 Mo. App. 579; Chinn v. Pretches, 42 Kan. 316; Emmerich v. Hefferson, 97 N. Y. 619.

Robinson & Goodrich for respondents.

(1) Relator is not entitled to the relief sought. The Supreme Court can consider only the statements contained in the opinion of the Court of Appeals as to the evidence, facts or pleadings in the cause, and cannot look beyond such recitals for any further ground to quash the judgment of the Court of Appeals. State ex rel. Reynolds, 257 Mo. 19; State ex rel. v. Ellison, 263 Mo. 509. (2) The motion to dismiss was not a part of the record proper, and the ruling thereon is not preserved for review unless by ground lodged in a motion for a new trial and by timely exceptions. Tarkio v. Clark, 186 Mo. 293; Shohoney v. Railroad, 231 Mo. 152; Hodson v. McAnerney, 167 Mo. App. 468;

Godfrey v. Godfrey, 228 Mo. 513; Silberberg v. Gitenstein, 168 Mo. App. 399. (3) The opinion of the Kansas City Court of Appeals is in accord and harmony with all of the controlling decisions of the Supreme Court. (4) Even conceding, which we do not, that the first two grounds of the motion to dismiss were based upon the record alone, it cannot be contended that the third ground did not require evidence to support it. (5) Part of the testimony offered in support of the motion to dismiss consisted of amended pleadings. When a pleading is amended by filing a new pleading, its functions are at an end. It is no part of the record as evidence because originally filed as a pleading, and cannot be used unless offered in evidence. Machine Co. v. Pierce, 5 Mo. App. 576; Ingwerson v. Railroad, 250 Mo. 335; Anderson v. McPike, 86 Mo. 293; Railroad v. Bank, 212 Mo. 517; Forrister v. Sullivan, 231 Mo. 345, 352. (6) Exhibits attached to a petition are no part of it. Part of the testimony offered in support of the grounds for the motion consisted of exhibits to abandoned and pending petitions. Hanks v. Hanks, 218 Mo. 670. (7) It is the correctness of the ruling of the trial court, and not the reason for it, that the appellate court is called upon to review. State ex rel. v. Thomas, 245 Mo. 75.

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REVELLE, J.—Original proceeding by *certiorari* to quash judgment of the Kansas City Court of Appeals, the relator alleging that it runs afoul of controlling decisions of this court.

The facts stated by the Court of Appeals in its opinion are substantially as follows:

Plaintiff filed its suit April 8, 1913, to enforce a mechanic's lien for certain materials, of the total value of \$1276, furnished under contract with the defendant construction company for a building being erected by the latter company for the defendants Frank R. and

Myrtle A. McDermard, on certain lots in Kansas City owned by them. On May 12, 1913, the McDermards filed a motion to make the petition more definite and certain, and this was by the court sustained, November 29, 1913. January 9, 1914, relator filed an amended petition, and on February 9th the McDermards filed their motion to strike this out, and to dismiss the suit as to them. This motion was sustained, and two days thereafter relator filed a motion to set aside the order of dismissal and to reinstate the action against the McDermards, which the court heard and sustained, April 22nd. On April 25th the McDermards filed a motion that the cause be dismissed as to them upon the following grounds:

“(1) Because the record shows on its face that if plaintiff ever had any right to establish and enforce a mechanic’s lien upon property of said two defendants or either of them, such right, if any, had expired, and this court was without jurisdiction to establish or enforce said lien, at the time when the last amended petition in said action as against said two defendants was filed on, to-wit, the 22nd day of April, A. D. 1914; and that said court is without jurisdiction to establish or enforce a mechanic’s lien on property of said two defendants or either of them in said action.

“(2) Because the record shows on its face that plaintiff has not sued the person or persons who, if anybody, contracted and owed the debt on the account filed as the foundation for the right of action in said suit, and as the basis of the alleged claim for a mechanic’s lien on the real estate and buildings alleged in the original petition and amended petitions to be owned by said Frank R. McDermard and Myrtle A. McDermard and to be subject to said claim for a mechanic’s lien sought to be established and enforced thereon.

“(3) Because J. B. Neevel and R. B. Neevel, co-partners, doing business under and by the partnership firm name and style of J. B. Neevel & Sons Construction Company, have not been made defendants in this action and this court is and ever was without jurisdiction to establish and enforce a mechanic’s lien herein without them.”

Upon a hearing of this motion the court entered the following order in relation thereto:

“Now on this day the court, having heretofore taken defendants’ . . . motion to dismiss as to themselves under advisement, does now sustain said motion as to the *first ground*, to which plaintiff objects and excepts.”

At a later date, to-wit, June 25th, the court made the following order:

“The plaintiff submits evidence of indebtedness of defendant J. B. Neevel & Sons Construction Company to the plaintiff herein, and said cause having heretofore been dismissed by the court as to defendants Frank R. McDermant and Myrtle A. McDermant, *the court declines to hear evidence touching a mechanic’s lien on the property involved*, to which ruling of the court in favor of defendants the plaintiff excepts. . . . And it is further considered and adjudged by the court that said action having been heretofore dismissed by the court on the 13th day of June, 1914, as to the defendants Frank R. McDermant and Myrtle A. McDermant, upon their motion, plaintiff recover nothing of defendants Frank R. McDermant and Myrtle A. McDermant, and have no lien upon the property of said Frank R. McDermant and Myrtle A. McDermant, herein involved, and that the said Frank R. McDermant and Myrtle A. McDermant go hence without day and have judgment against the plaintiff herein for their costs herein expended.”

Relator appealed from this judgment to the Kansas City Court of Appeals, without first having filed a

motion for new trial, but, in due time, filed its bill of exceptions. Because of relator's failure to file a motion for new trial the Court of Appeals held that its inquiry could not be extended to any matter of exception. Of this ruling relator makes no serious complaint, and did not invoke our writ because thereof. The court went further, however, and held that because the motion to dismiss raised issues of fact, as well as of law, and required evidence to support parts of it, it could not be treated as the legal equivalent of a demurrer, and could, therefore, not be held to preserve itself without the aid of a bill of exceptions and motion for new trial; and for this reason it declined to review the ruling on the motion to dismiss.

I. The sole proposition upon which our decision is legitimately invoked is the ruling of the Court of Appeals that the so-called motion to dismiss, upon which final judgment was entered, was not in legal effect a demurrer, and that the ruling of the trial court thereon could not be reviewed, because not preserved by motion for new trial.

The court announces the general and uniformly accepted doctrine that the legal character of a pleading is to be determined by its substance, and not name, and that a motion to strike out or to dismiss may fill the office of a demurrer, and be so treated, where it is, to all intents and purposes, a demurrer, and is dispositive of the whole case as a matter of law; but, anent its application to the instant case, says: "Where, as in the present case, it raises issues of fact, as well as of law, and requires evidence to support it, there is no good ground upon which it will be treated as the legal equivalent of a demurrer, and it could not be held to preserve itself without the aid of a bill of exceptions or a motion for new trial." For the reasons last stated the court held that the ruling sus-

Appeal:
Record
Matter:
Review
on Merits.

taining the motion was not before it for review, and declined to pass upon other questions, which it is alleged the record presented, such as the legal effect of the first dismissal and reinstatement of the case, whether the former orders, entries and pleadings were a part of the record proper in the case, and whether a court will take judicial notice of *all* proceedings before it in the same litigation and of the status of the case as shown by its own record, or whether it is necessary to prove such matters.

It is *unnecessary in this case* for us to examine any part of the record beyond the opinion of the court. This discloses that the motion was sustained by the trial court solely *as to the first ground*, and this ground was “‘*because the record shows on its face*’ that if plaintiff ever had any right to establish and enforce a mechanic’s lien, such lien, if any, had expired, and this court was without jurisdiction to establish or enforce said lien at the time when the last amended petition was filed on the 22nd day of April, 1914, and that this court is without jurisdiction to establish or enforce the mechanic’s lien.” Had the motion stopped with this, there could be no doubt as to its legal character, because, regardless of its title, the legal effect and purpose thereof was that of a demurrer, and no exception, motion for new trial or bill of exceptions would be necessary to warrant a review of the ruling thereon. It is well established in this State that a pleading stating no cause of action or defense is open to a motion to strike out, as well as to what is commonly called a demurrer, and that a demurrer, not waived by pleading over, preserves itself, without the aid of a bill of exceptions or motion for new trial. It is equally well established that a motion to strike out or to dismiss, which fills the office of a demurrer, must be judged by the rules pertaining to demurrers. [Shohoney v. Railroad, 231 Mo. l. c. 148, and numerous cases there cited.]

No evidence in relation to the first paragraph of the motion was necessary, *or even proper*, because things appearing on the face of the record of a case conclusively speak for themselves. If, under the averments of this paragraph, defendants offered as *evidence* matters which *properly* and *lawfully* were the record in the case they did a useless and ineffectual thing, as a court takes judicial notice of such matters; and if they offered, and the court received, evidence of things which did not appear on the face of the record, they went beyond the scope of this part of their motion, and unwarrantedly broadened the issue which it tendered. By neither of these acts could defendants change the legal nature of their plea or the fixed rules of law in relation thereto. For the purpose of the first ground defendants planted themselves squarely upon what appeared from the face of the record, and plaintiff had a right to rely upon this issue without preparing to meet another. Now, does the fact that there was another ground set out in the motion, which required evidence in its support, but which was not sustained, change the legal character, effect and purpose of the former? We think not. We are told in briefs that the trial court heard evidence, and in this it was warranted, in relation to the third ground, but the record tells us that it was not upon the evidence offered, but the disclosures of the record, that the motion was sustained, the ground requiring evidence not being upheld. We must indulge the presumption that the trial court sustained the motion for the reasons and upon the ground it specifically assigned, and that in reaching its conclusion thereon it considered nothing except that which it was authorized to consider. In this we are but giving effect to the "salutary presumption indulged in favor of the correctness of the rulings" of circuit courts. [Millar v. Madison Car Co., 130 Mo. 1. c. 523.]

Had the court not specified that it dismissed this cause because of what appeared upon the face of the record, the case would be different, and this for two reasons: (1) In that event appellant would have had no right to rely solely upon the disclosures of the record proper in preparing his case for appellate review; and (2) because as long as the motion went both to the record proper and matters of exception, appellate courts would indulge the presumption that the trial court had decided correctly, if not upon the disclosures of the record, then upon the matter of exception alleged in the motion, and which had not been preserved for review. So far, at least, as determining relator's prima-facie case of error, it is our opinion that the correctness or incorrectness of the trial court's ruling on the motion to dismiss must depend upon what the face of the lawful record of the case discloses, and that such matters were preserved for review, without the aid of a motion for new trial.

Cases have been cited by respondents in which this court has held that in appeals from an order granting a new trial, and in which the trial court stated the ground for its action, this court would sustain the order if it found that *any* assignment in the motion was good, even though it concluded that the reason stated by the trial court was not well taken. But in all such cases this court has further held that the appellant assumes the burden of showing error *only* as to the ground upon which the court acted, and as to the other grounds of the motion the presumption will be indulged that the action of the trial court in *not* sustaining them was right until *respondent* shows the contrary. [Bradley v. Reppell, 133 Mo. 545; Ittner v. Hughes, 133 Mo. 679; State ex rel. v. Thomas, 245 Mo. l. c. 73-4.] Neither are we unmindful that in State ex rel. v. Thomas, *supra*, this court held that an appellant cannot single out in preparing the bill of excep-

tions only such matters as relate to the reasons given by the trial court for granting the new trial, but should embody in his bill all matters of exception relating to other assignments in the motion. In that same case, however, the court distinguishes between one of this character and an appeal from an order granting a new trial. In this connection the court said: "There is a difference in this respect between an appeal from a *final judgment* and from an *order granting a new trial*. In the former if prejudicial error *appears* the judgment cannot stand, regardless of the record as to *other* alleged errors, while in the latter the appeal is from one ruling to which there is but one exception, and if that ruling is right upon any one of the grounds upon which it was asked, it should not be reversed." And we might add that with the former the aggrieved party is having his last day in court, while in the latter the doors are open to another trial and appellate review. In this case the appellant appeals from a final judgment and if the legitimate record of the case discloses error therein it should not be permitted to stand, regardless of other things which might appear, but which do not. Could it in this or in any other case, be held that if the lawful and constituent parts of the whole record proper showed prejudicial error in the judgment the same should stand on appeal? The question answers itself. Error standing boldly out defies law and order and proclaims justice a travesty, and should not go uncorrected.

It is not our province to determine how the Court of Appeals shall decide the various questions involved in this record, but we do hold that the ruling of the trial court dismissing the case as to the McDermands should be reviewed by the Court of Appeals upon the disclosures of the whole record proper, including all such record matters of which judicial notice is required to be taken. In holding to the contrary the

Court of Appeals failed to follow, among others, the following decisions of this court: *Burrows v. McManus*, 249 Mo. 555; *Knisely v. Leathe*, 256 Mo. l. c. 358; *Austin v. Loring*, 63 Mo. l. c. 21; *Bateson v. Clark*, 37 Mo. l. c. 34; *Jones v. Manly*, 58 Mo. l. c. 563; cases cited in *Shohoney v. Railroad*, 231 Mo. l. c. 148-152; *Pelz v. Bollinger*, 180 Mo. 252; and *State ex rel. v. Ulrich*, 110 Mo. 350, and cases heretofore cited. The point upon which the motion was sustained went to the very vitals, to the whole, and not a mere part, of the pleading, and in such cases this court has held the ruling thereon reviewable without a motion for new trial or bill of exceptions.

Neither is it necessary or proper for us to decide whether the bill of exceptions filed by appellant, but unavailable to it, because not aided by its motion for new trial, is available to respondents for the purpose of pointing out to the Court of Appeals that the motion was properly sustainable upon grounds other than that stated by the trial court. We leave this subject to the Court of Appeals, the tribunal of its jurisdiction, and such cases as *Ittner v. Hughes*, 133 Mo. l. c. 688; *Bradley v. Reppell*, 153 Mo. l. c. 560, and *State ex rel. v. Thomas*, 245 Mo. 65.

It follows that the judgment entered by respondents, as Judges of the Kansas City Court of Appeals, in the case of the Southwest National Bank of Kansas City v. Frank R. McDermand and Myrtle A. McDermand, should be quashed and for naught held, to the end that respondents, as such judges, may recall their mandate, if any has issued, and retry said cause upon the appeal filed with them and determine the issues therein presented, in conformity with the law as announced herein and the former decisions of this court. It is so ordered. *Woodson, C. J.*, and *Blair, Faris and Graves, JJ.*, concur; *Walker, J.*, concurs in result; *Bond, J.*, dissents.

THE STATE ex rel. CHARLES J. LEPPERT et al.
v. CORNELIUS ROACH, Secretary of State.

In Banc, December 22, 1915.

1. **CORPORATION: Incorporation Tax: Distinction Between Capital and Capital Stock.** In determining the amount of money which a corporation must pay to the Secretary of State for its certificate of incorporation, it is not material to accurately define, and distinguish the difference in meaning of, "capital" and "capital stock." The amount of money required by law to be paid into the corporation's treasury in money or money's worth for the prosecution of its business when organized, may not improperly be termed its capital stock, but it also constitutes its assets or capital, because it is its actual and only property.
2. ———: ———: **A Tax and Not Fees.** The money required to be paid by incorporators as a prerequisite to the issuance of the articles of incorporation is not a fee for clerical services to be rendered by the Secretary of State, but is a tax levied by the State on a corporation at its creation, for revenue purposes. And being a tax they must pay in proportion to the true value of its actual assets taken as capital stock, whatever be the proposed capitalization—the ruling, however, not being applicable to business companies incorporated in pursuance to statute upon the payment into the corporate treasury of fifty per cent of their authorized capital stock.
3. ———: ———: ———: **Title of Constitution Article.** The title of an article of the Constitution in which a certain section is found is, in a legal sense, no part of said section and cannot be used to amplify or restrain its meaning; but it may be properly considered in determining the purpose of the framers of the instrument in classifying the section—under the general rule that a title is presumed to express the intent of a law unless plainly contradicted by its body. And, hence, the fact that the section of the Constitution providing that no business corporation shall be created unless the persons named as incorporators shall, at or before the filing of the articles of association, pay into the State Treasury, the fees therein specified, is found in the article entitled, "Revenue and Taxation," authorizes the conclusion that the title indicates the nature of that payment to be that of a tax, and not a mere fee for clerical services.

State ex rel. v. Roach.

4. ———: ———: Amount. Where the affidavit of the incorporators attached to the articles of association states that the true value of the money and property to be taken in payment of the capital stock of the corporation is \$91,000, the incorporators must pay an incorporation tax on that sum, and cannot satisfy the demands of the law by applying for the formation of a corporation with an authorized capital stock of \$50,000 and tendering a fee based on a capitalization of \$50,000.

Held, by WOODSON, C. J., dissenting, that the incorporators of a business corporation may arbitrarily capitalize their company for any amount they deem proper, within the limits prescribed by the statutes; that the board of directors may declare dividends out of any surplus money the corporation may have on hand over and above its capitalization, including money contributed by its stockholders after the incorporation has been effected; that the mere fact that the corporators, at the time of applying for incorporation, announced their intention to use in the business of the company any more money or property than that represented by its capitalization would not change the legal status of the company, capitalization or shares of stock, nor would the fact that such an announcement was contained in the application for the charter; and that the announcement in the articles that they intended to use \$41,000 worth of property over and above the capitalization in the business of the company, was wholly voluntary, constituted it no part of the capitalization, and did not authorize the Secretary of State to assess an incorporation tax thereon.

5. ———: ———: ———: Surplus. A ruling requiring a company to incorporate for the true value of its property taken as capital stock as shown by the articles of agreement will not prevent it from accumulating a surplus. After a company is incorporated, the State does not concern itself with the manner in which it conducts its business, whether successfully or otherwise, provided it complies with the law.

Mandamus.

WRIT QUASHED.

Leahy, Saunders & Barth and David W. Voyles
for relators.

(1) This is a mandamus proceeding to compel the Secretary of State, respondent herein, to accept articles of incorporation showing on their face an itemized

list of property, amounting to \$91,084.56, whereas the capital stock is fixed at \$50,000. Respondent insists that the capital stock of the proposed corporation, Leppert-Roos Fur Company, must equal the amount of its assets, and that the company cannot be incorporated with a surplus. (2) The relators have the right, under the laws of this State, to fix the capital stock of the corporation which they have associated to organize, at any sum agreed upon by them, within the maximum and minimum limits, provided by law. R. S. 1909, sec. 3354, as amended by Laws 1911, p. 148. (3) The practical administrative policy followed in this State for many years to incorporate companies with a surplus, uniformly acquiesced in heretofore, is of persuasive force and opposed to any construction of the statutes which would impute to the General Assembly an intention to prohibit the organization of corporations with a surplus. *Timmonds v. Kennish*, 240 Mo. 328; *Folk v. St. Louis*, 250 Mo. 141; *Ewing v. Vernon County*, 216 Mo. 689; *Westerman v. Supreme Lodge*, 196 Mo. 709; *State ex rel. v. Reichmann*, 239 Mo. 95; *Ross v. Railway*, 111 Mo. 25. (4) The purpose of the Act of 1911, Laws 1911, pp. 148-149, enacting a new section in lieu of Sec. 3339, R. S. 1909, requiring a disclosure of the value of the property transferred for the payment of capital stock, is for the protection of the stockholders and those who might deal with the corporation by preventing an overissue of such stock. The act was borrowed from Massachusetts. 2 Revised Laws Mass., chap. 110, 1902; *Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Elevator Co. v. Tow Boat Co.*, 152 Mass. 431. (5) The logical consequence of the proposition that incorporators are not permitted to so fix the amount of capital stock, in reference to the total assets of the company as to leave a surplus, is that, after a corporation has once been formed, no surplus can be accumulated for a period longer than would be necessary to convert it into cap-

ital stock or to distribute it in dividends; and this is contrary to a later express statutory enactment in this State as to certain classes of corporations. Laws 1915, p. 159, sec. 116; Laws 1913, p. 168, sec. 5. (6) (a) Our constitutional provision and subsequent statutory enactments based thereon, providing for payment into the treasury of fees upon incorporation, based on the issue of stock or subsequent increase thereof, is merely a requirement for payment to the State of a special form of compensation for the granting of the corporate franchise, and is not primarily a revenue measure, the taxation of corporations being provided for in other ways. 2 Tiedeman, State and Federal Control of Persons and Property, p. 953; Constitution, art. 10, sec. 21; R. S. 1909, secs. 2376, 11357 and 11552. (b) The use of the term "capital stock" in the Constitution and in the statutes relating to license fees requiring payment into the State Treasury of fees upon incorporation, cannot afford any basis upon which such provision could be construed to mean that like fees are required to be paid upon the capital of such corporation, as a wide distinction exists between the terms "capital stock" and "capital." The former is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders; while the latter is the actual property of the corporation constantly increasing or diminishing in value. 1 Cook on Corporations (7 Ed.), sec. 8; 6 Cyc. 347; Abbott's Dictionary of Terms and Phrases, used in American and English Jurisprudence (1879), "Capital Stock;" Bouvier's Law Dictionary, "Capital," "Capital Stock;" Wells v. Green Bay Co., 90 Wis. 442; Thompson on Corporations (2 Ed.), sec. 3408; R. S. 1909, sec. 11519; Railroad v. Shacklett, 30 Mo. 550; State v. Railroad, 37 Mo. 267; St. Joseph v. Railroad, 39 Mo. 478; State ex rel. v. Brinkop, 238 Mo. 312. (c) A resume of the constitutional and statutory provisions in Missouri, from 1820 to date, conclusively establishes that the

distinction between "capital" and "capital stock" has always been maintained in this State. (d) Section 3348, R. S. 1909, governs the declaration of dividends of manufacturing and business corporations and makes the directors jointly and severally liable for the payment of dividends when the company is insolvent. Since directors are penalized for the illegal payment of dividends, their discretion as to creating a surplus should not be taken from them. *Shields v. Hobart*, 172 Mo. 517; *McLaren v. Planing Mills Co.*, 117 Mo. App. 40; *Laws 1915*, sec. 60, p. 130, sec. 121, p. 163, also secs. 116 and 171, pp. 159 and 193.

John T. Barker, Attorney-General, *S. P. Howell* and *Lee B. Ewing*, Assistant Attorneys-General, for respondent; *Kenneth Sears* of counsel.

(1) That prior to the Act of 1911, corporations were permitted to file their articles and receive a certificate of incorporation from the Secretary of State with a "capital stock" less than the actual value of the assets is not decisive or even persuasive on the court under the facts of the case at bar. Under the act mentioned the Legislature specifically required the incorporators to set out in detail the amount and value of the property set aside for the purpose of paying the "capital stock" in order that the Secretary of State could ascertain and know whether or not the assets exceeded the proposed "capital stock." Secs. 3339-3341, R. S. 1909; *Laws 1911*, pp. 148-149; *Bank v. Gillespie*, 209 Mo. 255. (2) Regardless of the purpose of the Act of 1911 the constitutional provision, article 10, section 21, must be given its legitimate effect. (3) In section 21 of article 10 of the Constitution of Missouri a method is provided by the organic law for the purpose of producing revenue, and not merely, as contended by relator, for the payment of a fee to the Secretary of State for issuing a certificate of incorpo-

ration. State ex rel. v. Lesueur, 99 Mo. 557; State ex inf. v. Gun Club, 121 Mo. App. 372. (4) In the formation of a corporation "capital stock" means the funds of money or property on which and with which the business is to be commenced and carried on; and in revenue statutes the term is often used as synonymous with assets or property. San Francisco v. Spring Valley Waterworks, 63 Cal. 531; Burrall v. Bushwick, 75 N. Y. 216; People ex rel. v. Ginseng Co., 105 N. Y. App. Div. 178; Railroad v. Shacklett, 30 Mo. 560; State v. Railroad, 37 Mo. 265; St. Joseph v. Railroad, 39 Mo. 478; People v. Morgan, 178 N. Y. 433, 58 L. R. A. 514; State Board of Equalization v. People, 191 Ill. 547; Hubbard v. Bush, 61 Ohio St. 261; Sturgess v. Carter, 114 U. S. 511; Tel. Co. v. Norman, 77 Fed. 22; State v. Duluth Gas & W. Co., 76 Minn. 96, 57 L. R. A. 63; Railroad v. Allen, 15 Fla. 660; Oil Mill Co. v. Decell, 33 So. (Miss.) 412; Foster v. Stevens, 63 Vt. 182; 6 Cyc. 348; 1 Cook's Stockholders & Corporation Law (3 Ed.), sec. 9.

WALKER, J.—This is an original proceeding by mandamus instituted in this court by relators to compel the respondent, who is the Secretary of State, to issue articles authorizing the creation of a business corporation under article 7, chapter 33, Revised Statutes 1909, as amended (Laws 1911, p. 148.) The application was made for the formation of a corporation with an authorized capital stock of \$50,000, and the required fee based on this capitalization was tendered. Under the statute of 1911, *supra*, when the capital stock of a company applying for incorporation consists of property instead of cash, it is required that the articles of agreement give an itemized description of such property, sworn to by the officers and directors of the proposed company, setting out the cash value of each item thereof; if realty, a specific description of same

is to be given, with the cash value of each tract; if personalty, the location of each class of property is to be given, with its actual value by classes. In the instant case the capital stock, except \$1000 in cash, consisted of personalty, which was in the articles of agreement classified and valued as required by the statute. The aggregate valuation of same so set apart and to be employed in the business of the company was more than \$91,000. In their affidavit attached to the articles of agreement relators say that the property described is to be taken in payment of the capital stock of said company and that the value placed thereon by them is the actual cash value of such property. Regardless of this showing, relators contend that they are entitled to fix the amount of the capital stock of the proposed corporation arbitrarily at \$50,000, which is the maximum amount of capital stock for which the minimum fee may be paid to the State for a charter. Under this state of facts the respondent refused to issue the articles of incorporation, on the ground that the capital stock of the proposed company, as shown by its articles of agreement and as admitted by relators in their affidavit thereto, was \$91,000, and the fees required to be paid to the State upon this capitalization should have been tendered to authorize the granting of the charter.

Time need not be taken or words wasted in defining the distinction between the capital and the capital stock of a corporation. The distinctive meanings of these terms, many of which have been compiled by industrious counsel, need not concern us here, because they afford no aid in determining the question under consideration. Whatever differences there may be between their respective meanings are well enough when applied to a going corporation which has accumulated assets, properly termed its capital, but such conditions do not exist here. A company is sought to be incorporated. It is immaterial that the business in

which it proposes to engage was theretofore conducted by relators as individuals. So far as the State is concerned the incorporation of the company is the beginning of its business. The amount required by law to be paid into its treasury by its stockholders in money or money's worth for the prosecution of its business when organized may not improperly be termed its capital stock, but at the same time this constitutes its assets or capital, because it is the actual and only property of the corporation. In fact, as a newly created corporation its full paid capital stock is, in the very nature of its existence, all that it can possess. That is the condition here, and one of the questions to be determined in this case is whether the proposed incorporators are asking incorporation on a capitalization based on the true value of the capital stock as shown by their sworn statement or upon an arbitrary amount less than such true value.

Confronted with this state of facts, it is necessary to determine the nature of the payment required to be made by relators to authorize the respondent in issuing the articles of incorporation, and the manner in which this payment is to be measured. In other words, directing the inquiry to the concrete case, is the payment required to be made by incorporators as a prerequisite to the issuance of the articles of incorporation a fee for clerical services rendered by the Secretary of State; or, is it a tax levied by the State on a corporation at its creation, for revenue purposes? If a fee, the amount for which a corporation may be capitalized may be fixed arbitrarily by the incorporators regardless, as in this case, of the value of the property to be taken as capital stock as set forth in the articles of agreement required to be filed when application is made for the charter, provided, of course, that value is equal to the total amount for which the company is to be incorporated. If, however, the payment required is in the nature of a tax, then the com-

pany must be incorporated for an amount equal to the total cash value of the property to be taken as the capital stock set forth, as before stated, in the articles of agreement. This for the reason that a capitalization for a less amount than the total cash value of the property set forth in the articles of agreement would prevent the levy and collection of the corporation tax upon the full amount of the capital which the company proposed to employ in its business; or, conversely, it would enable the company to escape the payment of a corporation tax upon the value of the property in excess of the amount for which the company was incorporated.

A section of our State Constitution (Sec. 21, art. 10), under the subdivision entitled, "Revenue and Taxation," provides, among other things, that no business corporation shall be created or organized under the laws of this State unless the persons named as incorporators shall, at or before the filing of the articles of association or incorporation, pay into the State Treasury the fees therein specified. This is followed by a general proviso that nothing contained in the section shall be construed to prohibit the General Assembly from levying a further tax on the franchises of a corporation.

This section first found lodgment in our laws in the present Constitution, and while held to be self-enforcing (State ex rel. v. Lesueur, 145 Mo. 322), the General Assembly, in 1879 (Sec. 708, R. S. 1879), deemed it proper to enact (Sec. 2976, R. S. 1909), in the words of the Constitution, that portion of the constitutional section regulating the amount to be paid the State to authorize the issuance of articles of incorporation. This fact, if it have no other pertinence, is indicative of the importance with which the section was regarded by the General Assembly, because the action of the latter was not necessary to render the section operative.

We have shown that the section appears in the Constitution under the title of "Revenue and Taxation." While a title is, in a legal sense, no part of a law and cannot be used to amplify or restrain same, it may properly be considered here in determining the purpose of the framers of the organic law in thus classifying the section, under the general rule that a title is presumed to express the intent of a law unless plainly contradicted by the body of same. [Conn. Mutual Life Ins. Co. v. Albert, 39 Mo. 181; Sedg., Stat. Con., p. 39.] Applying this rule to the concrete case, the conclusion is authorized that the title indicates the nature of the payment required to be that of a tax and not a mere fee for clerical services, and there is nothing in the section which militates against the correctness of this conclusion; besides, it is supported not merely by abstract reasoning, but it has judicial sanction. Note the language employed by this court in discussing this section in State ex rel. v. Lesueur, 99 Mo. 1. c. 557:

"Section 21 of article 10 of the Constitution is plain. By it no association can be incorporated for any purpose other than for benevolent, religious, scientific and educational purposes, without the payment of a tax. *This tax . . .* is fixed at fifty dollars for the first fifty thousand dollars or less of capital stock and five dollars additional for every additional ten thousand dollars of stock. Now it is plain that the payment of *the tax* cannot be evaded by organizing a corporation under a law which makes no provision for stock. It is equally clear that the Legislature has no power to authorize the evasion of the payment by allowing corporations to be organized under this benevolent law, as it is called, without a capital stock. This court held in express terms in State ex rel. Richey v. McGrath, 95 Mo. 193, that the payment could not be avoided by reason of a legislative declaration that the corporation was one formed for benevolent purposes,

when the law under which it was brought into existence showed that it was a money-making institution.”

In the McGrath case, *supra*, the court designated the payment required to be made by the section under review as a *tax*. In *State ex rel. v. Lesueur*, 145 Mo. 322, where the consolidation of two railroad companies so as to form one company was under consideration, it was held that to effect this end the payment of the *incorporation tax* prescribed by the section was necessary. In *Cement Company v. Gas Company*, 255 Mo. l. c. 39, it was held, *arguendo*, that domestic corporations organized for profit must pay a *corporation tax* to the same extent and amount as foreign corporations. From these cases it appears that no doubt has been entertained as to the character of the payment in question and that it has uniformly been regarded as a tax. If it was nothing more than a fee for clerical services it is not reasonable that it would have been regulated in accordance with the amount for which the company was to be incorporated, nor would it have been deemed of sufficient importance to receive constitutional as well as statutory recognition. Finally, it is evident from the proviso to the section that the framers of same regarded the payment therein required as in the nature of a tax, in authorizing the General Assembly “to levy a further franchise tax on business corporations.”

From the foregoing it follows that the nature of the payment required to be made to authorize the issuance of articles of incorporation, is a tax. Thus classified, one of the purposes of the Act of 1911, *supra*, becomes evident, viz., to enable the Secretary of State to determine from the articles of agreement the cash value of the property proposed to be taken as the capital stock. The information thus required to be given by the act is of two-fold importance; one in the protection of the public, that no corporation may be organized in which property is taken as capital stock unless the value of same is equal to the proposed capitalization;

the other in the interest of the State in the exercise of its taxing power, that a corporation may not be organized for a less amount than is shown by the sworn statement of its officers and directors to be the cash value of its property proposed to be taken as the capital stock, which would result in the State being deprived of the corporation tax on the excess of the value of the property above the proposed capitalization. From all of which the conclusion is authorized that the manner of the payment required to be made to the Secretary of State to authorize the issuance of articles of incorporation, is to be regulated by the true value of the property to be taken as capital stock and that this value should fix the basis of the capitalization of the company. This holding is subject to the limitations of section 3339, Revised Statutes 1909, as amended, Laws 1911, p. 148, which provides for the incorporation of business companies upon the payment at the time of their organization of fifty per cent of their authorized capital stock.

There is no merit in the contention of relators that a ruling requiring a company to incorporate for the true value of its property taken as capital stock as shown by the articles of agreement, will result in the prevention of the accumulation of a surplus. After a company is incorporated the State does not concern itself with the manner in which it conducts its business, whether successfully or otherwise, provided it complies with the law.

In view of what has been said the relators' motion for a judgment on the pleadings is overruled, and respondent's demurrer to relator's petition is sustained, which results in the quashing of the preliminary writ issued herein, and it is so ordered.

Graves, Bond and Blair, JJ., concur; Faris, J., dubitante; Woodson, C. J., dissents in separate opinion in which Revelle, J., concurs.

WOODSON, C. J. (dissenting).—I understand that the following legal propositions are true and indisputable.

First: That the incorporators of a business corporation may, under the laws of this State, arbitrarily capitalize their company for any amount they deem proper, within the limits prescribed by the statutes; and that the company, after it is incorporated, may, in addition to its capital, use in its business any sum of money its board of directors may fix, whether borrowed money or funds contributed by the stockholders.

Second: That the capital of the company may be paid in money or property, and that the par value of all the stock of the company must correspond in amount to the capitalization of the company so arbitrarily fixed by the incorporators, fully or partially paid, as the case may be.

Third: That the respective shares of the stock of the company cannot be issued for a sum in excess of their par value or face value, nor can the aggregate amount thereof exceed the amount of the capital of the company.

Fourth: That when the capital stock of the company so arbitrarily fixed has been fully paid in money or property, as prescribed by statute, neither the State nor its creditors can compel the company or its stockholders to pay for the use of its business, solvent or insolvent, any sum in excess of the par or face value of its capitalization; if insolvent, of course the State may force a discontinuance of its business or a dissolution of the company, and its creditors may force it into bankruptcy.

Fifth: That the board of directors of any such company may, at the proper time and in the proper manner, pay off and discharge any and all indebtedness the company may owe, and may declare dividends out of all surplus moneys or profits it may have on hand over and above its capitalization, whether earned by

the company as profits or contributed to it by the stockholders after the incorporation has been effected.

Under the foregoing incontestable legal propositions, it seems to me that there is no escape from the conclusion that all contributions or donations made by the stockholders to the company, over and above its capitalization, whether made before or after the incorporation has been perfected, are voluntary acts upon their part, and in no sense constitute a part of the capital of the company, and the company may at any time, in a proper manner, pay all such sums back to the stockholders, and such act would in no sense impair the capitalization of the company, nor do violence to its legal perfection; and neither the State nor the creditors of the company could legally object thereto or prevent such repayment. Of course, if the company should become insolvent before the payment or distribution had been made, then certain equitable and possibly certain legal rights might arise which might prevent the company from paying such sums back to the stockholders; but that is totally foreign to the question in hand, and needs no further consideration.

The fact that the law imposes a certain tax on the capital of a business company at the time of its incorporation can in no manner force the incorporators to increase its capitalization to the amount they desire or intend to use in its business; and it is wholly immaterial whether that intention is announced before or after the company has been incorporated. This must be true for the obvious reason that the incorporators may, under the law, as before stated, arbitrarily fix the amount of the capitalization of the company, and may in addition thereto use in its business any sum its agents and officers may deem proper.

Moreover, as previously stated, the mere fact that the stockholders, at the time of applying for the arti-

cles of incorporation, announced their intention to use in the business of the company more money or property than that represented by its capitalization would not change the legal status of the company, its capitalization, nor share of stock from what they would have been had that announcement been made subsequent to the perfection of the incorporation; nor would the fact that said announcement was made to the Secretary of State in an application for a charter change the situation in the least, for the reason that the law makes no such requirement of the stockholders, nor has the Secretary of State any legal right to require the performance of anything by them which the law does not require. Where it speaks he must speak, but where it is silent he must be silent.

In the case at bar the statement contained in the articles of agreement or application for the charter, that they intended to use \$41,000 worth of property over and above the capitalization of the company, in the business thereof, was wholly voluntary on their part, and therefore constituted it no part of the capital of the company.

For the reasons stated I dissent from the majority opinion, and believe the alternative writ of mandamus heretofore issued should be made permanent.

SADIE E. MILLER et al., Appellants, v. THOMAS
STAGGS et al.

In Banc, December 22, 1915.

1. **GUARDIAN'S SALE:** For Less Than Three-Fourths of Appraised Value. A private sale of real estate for less than three-
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fourths of its appraised value, whether by a guardian or administrator, is void, although approved by the probate court, for the court in such case has no jurisdiction to approve it. [Following *Carter v. Culbertson*, 100 Mo. 269, and overruling *Smith v. Black*, 231 Mo. 681.]

2. **QUIETING TITLE AND EJECTMENT: Judgment for Rents.**

In a suit, in one count, to quiet title, and in another, in ejectment, where the judgment is that defendants have no title, and it is admitted that the monthly rents and profits are a certain sum since the date of ouster, plaintiff should have judgment on the first count quieting the title, and on the other judgment for possession and for monthly rents and profits.

Held, by WOODSON, C. J., dissenting, that the suit being one in equity, with all the incidents attaching thereto, the Legislature cannot control the judgment.

Appeal from Phelps Circuit Court.—*Hon. L. B. Woodside*, Judge.

REVERSED AND REMANDED (*with directions*).

Holmes & Holmes and *Watson & Livingston* for appellants.

(1) The sale of the land in question having been made at a private sale for less than three-fourths of its appraised value, the probate court had no power to approve said sale, and the same was absolutely void. Secs. 432 and 433, R. S. 1909; *Carter v. Culbertson*, 100 Mo. 269. (2) The sale made in this case was not based upon any valid order of the probate court. Even if the original order was valid at the time it was made, it would not constitute a valid order to sell the real estate three years thereafter, unless it had been renewed from time to time, so that it could remain in force and effect. Sec. 433, R. S. 1909. (3) The petition of the guardian asking for the sale of the land in question was insufficient to confer jurisdiction upon the probate court. Sec. 430, R. S. 1909.

W. D. Jones and Lorts & Breuer for respondents.

(1) The sale of the land belonging to these minors having been made upon an order of the probate court, a report of the sale filed with said court, and the sale approved by the probate court, the sale was valid, and passed the title of said minors. The sale of real estate under an order of the probate court is a judicial sale if approved, and if the court had jurisdiction over the subject-matter and the parties, its approval and confirmation cures all prior irregularities, if any. *Blickensderffer v. Hanna*, 231 Mo. 93. (2) The filing of the petition in the probate court asking for an order of sale gave the court jurisdiction over the land, and while the order and judgment approving the sale may have been erroneous, nevertheless the court had jurisdiction to make the order, and not having been appealed from, it became a valid, final judgment, and cannot be questioned in this collateral proceeding. *Smith v. Black*, 231 Mo. 692. (3) An order approving the sale of real estate by the probate court is a judgment, and the same validity is accorded to the judgment of the probate court as is accorded to judgments of the courts of general jurisdiction, and for that reason the order approving the sale cannot be questioned in this collateral proceeding. *Camden v. Plain*, 91 Mo. 117. (4) Sales of real estate of minors are conducted in the same manner and the same proceedings had with reference thereto, as in cases of real estate of deceased persons for the payment of debts, except there shall be no publication to parties in interest before making the order. Sec. 431, R. S. 1909. (5) It is well settled in this State that the final judgment of the probate court in matters within its jurisdiction are as conclusive as are the judgments of courts of general jurisdiction, and the court having rendered a judgment in the nature of an order to sell the real estate belonging to minors, the guardian and curator had a right to sell said real estate

in compliance with said judgment, even if it was not sold at the next term of court after the judgment was rendered. The judgment of the probate court erroneously rendered in allowing claims against the estate and directing the sale of real estate to pay the same, is a final judgment, and cannot be collaterally attacked, but it is subject to impeachment in a direct proceeding for that purpose on two grounds only, namely: Lack of jurisdiction, or fraud in procuring it. *Covington v. Chamblin*, 156 Mo. 574.

GRAVES, J.—The respondents made a very fair statement of the pleadings thus:

“This was a suit filed by Fred Miller as plaintiff against Thomas Staggs, Wm. T. Furse and I. Dodson, defendants, to try title and in ejectment for Lot 6, Block 3, in Powell’s Addition to the Village of Newburg, Missouri. The defendant, Thomas Staggs, filed an answer admitting that he claimed the title to said real estate, and that he was in possession of the same, and denied that the plaintiff had any interest in said property, and averred that he purchased said property from Mrs. J. C. Todd for a valuable consideration, and received a warranty deed to the same, and prayed the court for a decree vesting the title to said property in him. The defendant, Wm. T. Furse, filed an answer in the nature of a general denial to both counts in the petition, and the defendant, I. Dodson, filed an answer denying the allegation in both counts, and admitting that he was in possession of the property as tenant of Thomas Staggs.

“Fred Miller, the plaintiff, and his sister, Alma Miller, were the only heirs at law of John Miller, deceased, who died intestate, seized and possessed of the real estate above described, and Fred Miller, the plaintiff, had before the institution of the suit purchased the interest of his sister, Alma Miller, in the above described real estate.

Miller v. Staggs.

"The court, after hearing the testimony of both plaintiff and defendant, found the issues for the defendant Thomas Staggs, and decreed the fee simple title to said real estate to be in the said defendant.

"Fred Miller, the appellant, having died since the appeal was taken, Sadie E. Miller, widow of Fred Miller, in behalf of Maude Miller and Fred Miller, Jr., minors and only heirs of Fred Miller, deceased, and as guardian of said minor heirs of the said Fred Miller, by leave of this court, made on the — day of December, 1914, is prosecuting this appeal as substitute appellant.

"John Miller, deceased, was the common source of title under which plaintiff and defendant claim.

"Defendant Staggs claims title through J. C. Todd, who purchased said property under a guardian's sale from Wesley Woolsey as guardian of Fred Miller and Alma Miller, said guardian's deed being dated November 24th, 1903."

The whole case turns upon the validity of the sale in the probate court and the deed made thereunder. The abstract of record before us shows an order of sale, dated "Aug. 31, 1900." The guardian's report of sale bears date of "Nov. 24, 1903," and it avers that the land was appraised at \$175 and sold to J. C. Todd for \$120, and that such sale was made in obedience to an order of the court made at the August term, 1900. To this report of sale there would seem to be attached an appraisement, dated September 1, 1903, in which the land was appraised at \$125. Sale was approved November 24, 1903, and deed ordered. The guardian's deed introduced in evidence, recites an order of sale at the August term of 1903 of the probate court, and further recites that the land was appraised at \$175, and sold to J. C. Todd for \$120. In the record, we also find another report of sale purporting to be at the November (1903) term of the probate court

which recites that the order of sale was made at the August term, 1900; that the land was appraised at \$175 and sold to J. C. Todd for \$120. In connection with this plaintiff offered what they call the "original appraisement" which on material parts reads:

Appraisement of all real estate belonging to the estate of Alma and Fred Miller, minors, late of Phelps county, Missouri, produced before the undersigned, F. L. Kitchell, S. A. Roach and W. D. Rodman, appraisers, duly qualified this first day of September, 1903.

Appraised Value.
Dollars. Cents.

DESCRIPTION OF PROPERTY.

One house and lot in being lot No.....in
Block No.....in Powell's Addition to
the Town of Newburg, Phelps county, Mo....\$ 175.00
Total amount of appraisement.....\$ 175.00

We, the undersigned appraisers, certify the above to be a full and fair appraisement of the real estate of John Miller, deceased, as produced before us by Wesley Woolsey, Administrator of said estate of John Miller, deceased.

Given under our hands this 1st day of September, A. D. 1903.

F. L. KITCHELL,
S. A. ROACH,
W. D. RODMAN,

Appraisers.

The other appraisement was introduced by defendants, and reads:

Appraisement of all the real estate belonging to the estate of Fred and Alma Miller, under the age of 16 years, of Phelps county, Missouri, produced before the undersigned, Scot Roach, F. L. Kitchell and W. D. Rodman, appraisers duly qualified this 1st day of September, 1903, by Wesley Woolsey, Guardian of said minors.

DESCRIPTION OF PROPERTY.

Lot six (6), of block three (3), Powell's Addition to Village of Newburg, Missouri, One Hundred and Twenty-Five (\$125) Dollars.

We, the undersigned appraisers certify that the above to be a full and fair appraisement of the real estate of Fred and Alma Miller, minors, as produced before us by Wesley Woolsey, guardian of said minors.

Given under our hands this 1st day of September, A. D. 1903.

SCOT ROACH,
F. L. KITCHELL,
W. D. RODMAN.

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It should be noted that the two documents wind up differently. The one introduced by defendant says that the real-estate appraised was that owned by Fred and Alma Miller, whereas the other says "appraisement of the real-estate of John Miller, deceased, as produced by Wesley Woolsey, Administrator," etc.

The trial court found for the defendant, and of necessity held the deed made by the guardian good, notwithstanding the fact that it showed upon the face thereof that the land was sold at less than three-fourths of its appraised value.

According to the ruling in *Smith v. Black*, 231 Mo. 681, the fact that the land was sold at less than three-fourths of its appraised value, does not vitiate the sale, if such sale is approved by the court. Woodson, J., who wrote that case said:

"The second insistence of counsel for appellant presents a more serious proposition, to-wit: That the sale is void for the reason that the administrator sold the land in question at private sale for a sum less than three-fourths of its appraised value, in violation of section 166, Revised Statutes 1879. That section, so far as material, reads: 'No real estate sold for the payment of debts shall be sold at private sale for less than three-fourths of its appraised value.'

"This question has never been directly passed upon by this court, or by either of the courts of appeal, so far as I have been able to ascertain. We must, therefore, approach it more upon principle than from authority."

As indicated above Division One reached the conclusion that the approval of the sale made it good, and that such approval was not subject to attack in a collateral proceeding.

Judge Woodson evidently overlooked the case of *Carder v. Culbertson*, 100 Mo. 269. In that case the exact question in the case at bar was up for considera-

tion. In the Smith case it was an administrator's sale, whilst in the Carder case it was a guardian's sale. The two statutes, however, are so near alike that the same rule should apply. In the Carder case, at p. 272, SHERWOOD, J., said:

"By stipulation filed it is agreed that the sole question to be determined is whether the curator's deed is valid. There can be no hesitation on this point; it is a plain matter of statutory provision. Sections 28, 29 and 30, page 469, General Statutes 1865, control this case.

"The last-named section declares: 'No real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three-fourths of its appraised value,' etc. The probate court had no jurisdiction to approve such a sale. Its order of approval was, therefore, *coram non judice*, and the deed showing the facts already recited was void on its face."

The Carder case was an opinion by the full court, whilst the Smith case is one by one division of the court only.

It should be added that in a subsequent case involving the sale of swamp lands Judge Woodson gave expression to views adverse to the language quoted from Smith v. Black, 231 Mo. 681, *supra*. We have re-examined the question and all agree that the rule announced by SHERWOOD, J., in Carder v. Culbertson, 100 Mo. 629, is the proper rule, and under the ruling in that case the judgment *nisi* should be reversed. The case of Smith v. Black, 231 Mo. 681, *supra*, in so far as it announces a rule contrary to the rule in Carder v. Culbertson, upon the validity of the deed involved, is overruled, and the judgment of the circuit court in this case is reversed. All concur.

PER CURIAM: We are asked to modify our judgment of a simple reversal, and this we think should be done under all the facts. The petition contains two

counts, one under section 2535, Revised Statutes 1909, and the other in ejectment. It is admitted that the monthly rents and profits are and have been since date of ouster, July 2, 1911, the sum of \$6.50 per month. It is admitted that defendants have no title if the deed discussed in the principal opinion was not good. Under these facts we should reverse the judgment *nisi*, and remand the case with directions to enter judgment for plaintiff on both counts of the petition. On the count to quiet title the plaintiff should have judgment quieting title in them. On the ejectment count they should have judgment for possession, with monthly rents and profits of \$6.50 per month from July 2, 1911. The motion to modify our opinion is therefore sustained and the opinion is modified and judgment directed as above. All concur, except *Woodson, C. J.*, who dissents.

WOODSON, C. J. (dissenting).—I dissent from the Per Curiam opinion: first, because when it is said that the case is here tried as an equity case it includes all the incidents thereto, without specially mentioning them; and, second, because this being an equity cause, this court is not bound by any legislation which prescribes the judgment it shall enter. If the Legislature can control the judgment, then the cause is not tried by a court of equity only in name, and the whole proceeding must therefore yield to the statutory judgment to be entered, which would destroy its character as an equitable proceeding.

CITY OF MOBERLY v. JULIUS H. LOTTER et al.,
Plaintiffs in Error.

In Banc, December 22, 1915.

1. APPELLATE JURISDICTION: Title to Real Estate: Condemnation: Easement. A suit by a city to condemn private

land for sewer purposes involves title to real estate. Even though a cursory view may suggest that only the easement and not the fee is affected, yet it remains true that, though the fee remain in the owner, his right to the use and exclusive possession of the land is either lessened or taken away, and as a consequence the title is affected to the extent of the injury.

2. ———: ———: **Writ of Error Issued By Court of Appeals: Transfer to Supreme Court.** After a writ of error has been timely and properly sued out in a court of appeals in a case of which such court does not have appellate jurisdiction (in this case, because it involves title to real estate), that court has power to transfer the case to the Supreme Court, which will take jurisdiction in the same manner as it would had an appeal in the case been erroneously certified by the trial court to the Court of Appeals and by that court transferred to this court. [GRAVES, J., and WOODSON, C. J., dissenting.]
3. ———: ———: ———: **Constitutional Limitations and Statute.** The definitions of the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals contained in the Constitution and the limitation upon the right of either to issue writs of error to cases reviewable by it, must be construed in connection with the power given by the Constitution (Section 6 of Amendment of 1884 to Article 6) to the General Assembly to provide by legislation for the transfer of cases from the one court to the other, and that has been done by Section 3938, Revised Statutes 1909, directing the course to be pursued in case the writ is sued out in a court not having appellate jurisdiction. The authority conferred by this statute is not an exercise of jurisdiction, but of a power to determine whether or not jurisdiction exists, and in its absence, as determined by the court, to transfer the case to the court invested with power to review it. The constitutional provision defining the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals applies as well to writs of error as to appeals.
4. ———: ———: ———: **New Suit.** The fact that the writ of error, by which the case was lodged in the Court of Appeals, is a new suit, does not determine the right of that court to transfer the case to the Supreme Court. The writ of error is to be held a new suit only to the extent of determining whether there is a *lis pendens* between the rendition of the judgment in the trial court and the suing out of the writ. *Held*, by GRAVES, J., dissenting, with whom WOODSON, C. J., concurs, that the suing out of a writ of error is the beginning of a new suit, and a court of appeals can institute no new suit in a case involving title to real estate, and is without jurisdiction to even take the preliminary step in such a suit; and being without jurisdiction in such case to issue a writ of error, but its issuance being *coram*

Moberly v. Lotter.

non judice, it can confer no jurisdiction upon the Supreme Court by a transfer of the case—the issuance of the writ being its own mistake, and not that of the circuit court, which may certify an appeal already taken to the wrong appellate court.

5. ———: ———: ———: ———: **Applicability to Original Writs.** Cases involving remedial writs reviewable only in the Supreme Court are not within the purview of Section 3938, Revised Statutes 1909, which by its terms is confined to appeals and writs of error. Any one of such writs, if improvidently sued out of a court of appeals, should be dismissed, because the court has no constitutional power to consider it.
6. **APPELLATE PRACTICE: Writ of Error: No Bill of Exceptions.** If there is no bill of exceptions or motion for new trial, a writ of error preserves only the record proper for review.
7. ———: **Record Proper: Admission in Abstract.** An admission by plaintiffs in error in a condemnation case that the petition contains a detailed description of the lands owned by them and of the parts to be taken, and asserting that for that reason the description is not set out, authorizes a holding that the lands to be taken are described with sufficient certainty.
8. **CONDEMNATION: Taking of Fee.** Statutes authorizing the fee of land taken for a public sewer to be vested by the judgment in the city, violate no constitutional provision.

Error to Macon Circuit Court.—*Hon. Nat M. Shelton*,
Judge.

AFFIRMED.

Warrick McCanne and *A. Doneghy* for plaintiffs
in error.

(1) The circuit court never acquired jurisdiction over the property of any of the defendants, which would warrant it in appointing commissioners. The statute provides as a condition precedent that before the commissioners shall be appointed, and before any sewers can be constructed that the council, by ordinance, define the district. R. S. 1909, secs. 9241, 9262. The description in the ordinance creating the sewer district, to-wit: “thence west on the center line of Logan street to the east line of tract No. 96, thence

north on the east line of tract No. 96," does not describe any land or monument with certainty. It does not give the number of feet or distance to the east line of tract No. 96, and does not give the name of the owner of said tract, nor the State, county, city or town in which it may be found, and does not refer to any existing matter, map or deed from which the description can be made certain. *Fox v. Courtney*, 111 Mo. 147; *State ex rel. v. Burroughs*, 174 Mo. 707; *O'Day v. McDaniels*, 181 Mo. 534; *Brewington v. Jones*, 85 Mo. 60; *Whaley v. Henchman*, 22 Mo. App. 486; *Mason v. Small*, 130 Mo. App. 249; *Hain v. Burton*, 118 Mo. App. 577; *Beckman v. Mephram*, 97 Mo. App. 164; *Weil v. Willard*, 55 Mo. App. 378; *Lamm v. Danville*, 77 N. E. 423; *Law of Real Property Conveyance*, Jones, 285, sec. 339. The petition does not state facts sufficient to constitute a cause of action; the ambiguity, in description, is patent on the face of the ordinances, petition and publication, and they are therefore void, and cannot be helped by parol. *O'Day v. McDaniels*, 181 Mo. 534; 1 Am. & Eng. Ency. Law, p. 529; *Campbell v. Johnson*, 44 Mo. 332; *Davis v. Davis*, 8 Mo. 56; *Mudd v. Dillon*, 166 Mo. 110; *Law of Real Property*, Jones, p. 281, sec. 337; *Lamm v. Danville*, 77 N. E. 423. Title to real estate is not involved in this case for the simple reason that all that is acquired by the city and all that is parted with by the property owner is personal property and not real estate. The right acquired is an easement which all courts at all times have defined to be an incorporeal hereditament; a chattel interest pure and simple; a right issuing out of land less than a freehold; personal property, nothing more or less. A chattel real, it is true, but, nevertheless, personal property carved from the land; an interest that lies in grant and not in livery of seizin. 10 Am. & Eng. Ency. Law (2 Ed.), 399; *Orchard v. Wright Co.*, 225 Mo. 414; *Springfield Co. v. Schweitzer*, 151 S. W. 129; 3 Am. & Eng. Ency. Law (1 Ed.), 164; *Bouvier, Law Dic., Title*,

Easements; Bouvier, Law Dic., Title, Incorporeal. In the instant case the easement acquired by the city and the servitude imposed on the land is of a base character. The title, reversion, possession and use of the land (subject only to the right of the city to enter and lay its sewer pipe according to the plans and specifications named in the condemnation proceedings, and the right to thereafter enter, during the life of the easement, for the purpose of making necessary repairs, etc.), is all in the property owner. A servitude or incumbrance which would not be a breach of covenants of seizen in case of a deed made covenanting that the grantor was seized of the land. Kellogg v. Malin, 50 Mo. 496. The right acquired by the city is not an interest in the land but a mere easement which conflicts not in the slightest degree with the absolute proprietorship of the owner. Snyder v. Warford, 11 Mo. 514; Railroad v. Clark, 121 Mo. 180; Kellogg v. Malin, 50 Mo. 499. The owner can build on the land, pasture it or cultivate it so long as he does not interfere with the right to lay and repair the sewer. Mullins v. Metropolitan Co., 126 Mo. App. 507; 10 Am. & Eng. Ency. Law (2 Ed.), p. 429; Belcher Co. v. St. Louis Co., 82 Mo. 125. And, if the interest acquired is personal property and not real estate then the title to real estate is not involved and the jurisdiction is in the Court of Appeals. Constitution, art. 6, sec. 12. Any interest in land, less than a freehold, is personal property. Orchard v. Wright Co., 225 Mo. 414; Springfield Co. v. Schweitzer, 151 S. W. 129; Schouler's Personal Property, pp. 28, 29, 45; 1 Washburn, Real Property (3 Ed.), pp. 15, 22.

J. Elmer Ball, Arthur B. Chamier and Willard P. Cave for defendant in error.

(1) The judgment is regular upon its face, and there being no testimony preserved in a bill of exceptions all the legal presumptions are in favor of its reg-

ularity, and it should be affirmed. 3 Cyc. 275; *Riggins v. O'Brien*, 34 Mo. App. 613; *State v. Dugan*, 110 Mo. 145; *State v. Mackin*, 51 Mo. App. 309; *State v. McCoy*, 162 Mo. 382. (2) It is not even necessary to define the limits within which private property shall be assessed to pay for such improvements, where the city elects to pay the damages out of any funds available in the city treasury, as is done in this case. Sec. 9273, R. S. 1909. (3) The judgment in this case is in accordance with the report of the commissioners, and follows the language of Sec. 9271, R. S. 1909, and the use of the words "in fee" can be treated as mere surplusage, as the entire judgment shows the purposes and objects for which the real estate was taken were for public use. Sec. 21, art. 2, Constitution. (4) Condemnation proceedings of real estate for public purposes involve the title to land, and the Supreme Court has exclusive appellate jurisdiction therein. *State ex rel. v. Rombauer*, 124 Mo. 598; *Miller v. Railroad*, 162 Mo. 424; *Baubie v. Ossman*, 142 Mo. 499; *Tarkio v. Clark*, 186 Mo. 285; *Kansas City v. Railroad*, 187 Mo. 151; *State ex rel. v. McCutchan*, 119 Mo. App. 69. (5) "A writ of error is an original suit and not a mere continuation of a former suit." *Macklin v. Allenberg*, 100 Mo. 337; *Kelme v. Nine*, 121 Mo. App. 718; 6 Am. & Eng. Ency. Law (1 Ed.), p. 812; *Bank v. Jenkins*, 104 Ill. 143; 2 Cyc. 510; *Widber v. Superior Court*, 94 Cal. 430. (6) "It [the Legislature] cannot impair the appellate or original power of the Supreme Court given by the Constitution." 7 *Lawson's Rights, Remedies and Practice*, par. 3783. Section 5, of the Constitutional Amendment of 1884, provides that: "In all causes or proceedings reviewable by the Supreme Court, writs of error shall run directly to the circuit courts," and that the Supreme Court shall have exclusive jurisdiction of such writs of error. (7) Section 3 of the Amendment of 1884 to the Constitution does not give authority to

the Legislature to enact any laws vesting the court of appeals with jurisdiction, where same is denied by the Constitution itself. (8) The Legislature cannot by its act (Sec. 3938, R. S. 1909) give validity to a void writ of error issued by a court of appeals improvidently, where such court of appeals had no jurisdiction over the subject-matter. Section 5 of the Amendment of 1884 to Constitution. (9) The act of the clerk of the Kansas City Court of Appeals in issuing a writ of error to the Macon Circuit Court, was a nullity, because said Court of Appeals had no jurisdiction over the subject-matter of the action. Sec. 12, art. 6, Constitution; *Kelmel v. Nine*, 121 Mo. App. 720. "A writ of error will not lie in condemnation proceedings, brought before a circuit judge in vacation, as such proceedings are not according to the course of the common law." *Railroad v. Morton*, 20 Mo. 70; *Lewis on Eminent Domain*, sec. 806; *Sweeney v. Tel. Co.*, 212 Ill. 475; *Dorchester v. Wentworth*, 31 N. H. 451; *Edrington v. Nix*, 49 Mo. 132.

WALKER, J.—This is a proceeding to condemn for sewer purposes certain lands of plaintiffs in error in the city of Moberly. A change of venue was granted to the circuit court of Macon county, where, upon a hearing, a judgment was rendered for the defendant in error on the 11th day of January, 1912. On the 2nd day of December, 1912, a writ of error was sued out in the Kansas City Court of Appeals and in compliance with the order of said court a copy of the final judgment in the cause was filed therein. Defendant in error thereupon filed a motion to quash the writ, alleging, among other things, that title to real estate was involved and that the Supreme Court alone had jurisdiction. Whereupon the Court of Appeals ordered the cause transferred to the Supreme Court. Defendant in error then filed in this court a motion to dismiss the cause, alleging that title to real estate was involved

and hence the Court of Appeals had no authority to issue the writ of error by which the case was brought to that court; and, more than a year having elapsed since the final judgment and no writ having been sued out in the Supreme Court, that plaintiffs in error were not entitled to a review of the proceedings here. The motion was ordered to be considered with the case.

I. Is title to real estate involved in the determination of this case?

It is held that the condemnation of land for a right of way of a railroad or for a highway so affects the title to real estate as to bring that class of cases upon appeal within the jurisdiction of the Supreme Court.

A cursory view may lead to the conclusion that in this class of cases only the easement and not the fee is affected; but while the fee remains in the owners, their right to the use and exclusive possession of the lands in either lessened or taken away, and as a consequence the title is affected to the extent of the injury inflicted. A condemnation of lands for a public sewer may not, after the work is completed, affect the owner's interest therein to the same extent as in the class of cases mentioned, but the injury is of a like character, differing only in degree and sufficiently interferes with the owner's proprietary rights to authorize the holding that the title to the land is involved. *Railroad v. Wyatt*, 223 Mo. l. c. 351; *Baubie v. Ossman*, 142 Mo. l. c. 502, and *Railroad v. Schweitzer*, 246 Mo. l. c. 128, are types of cases sustaining this conclusion.

II. Was the Kansas City Court of Appeals without jurisdiction in this proceeding and hence its transfer of this case to the Supreme Court a nullity? It is contended, although the writ was timely sued out, that the latter court acquired no jurisdiction by reason of such transfer. It is ele-

mentary that a writ of error is a writ of right and that it issues as of course upon the filing of a formal application therefor. [Smith v. Moseley, 234 Mo. l. c. 491; Sec. 2054, R. S. 1909.] While the proceeding to obtain the writ is in the nature of a new action (Turner v. Edmonston, 210 Mo. 411), its purpose as here invoked and as usually employed under our procedure is to set aside the judgment in the principal case. That this is its primary purpose is shown by the fact that the right to the writ or to an appeal is allowed in the same action at the option of the party. [Art. 16, chap. 21, R. S. 1909.] As thus employed it has been subjected to statutory regulation, not only as to the time within which it may issue, but who may join therein, the procedure necessary to be followed, what parties are affected and how (Secs. 2056-2078, R. S. 1909), and the course to be pursued if the writ is sued out in a court not having jurisdiction of the principal case. [Sec. 3938, R. S. 1909.]

The Constitution clearly defines the exclusive appellate jurisdiction of the Supreme Court and the Courts of Appeals, the one by express declaration (Sec. 12, art. 6 and Sec. 5, Amendment 1884 to Art. 6, Constitution) and the other by implication or a process of exclusion applied to the declaration as to the jurisdiction of the Supreme Court authorized by the established rules of construction. [State ex rel. v. Rombauer, 101 Mo. 499; Langston v. So. Ry. Co., 66 Mo. App. 73; State ex rel. v. Allen, 45 Mo. App. 551.] These definitions limit the right of the respective courts to issue writs of error to cases reviewable in each. Concerning this matter there need be no controversy, because the language is explicit. But these limitations must be construed in connection with the power given by the Constitution (Sec. 3, Amendment 1884 to Art. 6, Constitution) to the General Assembly to provide by legislation for the transfer of cases from

the Supreme Court to the courts of appeals or *vice versa*, as has been done by the enactment of section 3938, *supra*. The authority conferred by this section is not an exercise of jurisdiction, but of a power to determine whether or not jurisdiction exists, and in its absence, as determined by the court, to transfer the case to the court invested with power to review and determine same, or, as was said in substance in *In Re Garesche*, 85 Mo. l. c. 471, it is the extension of the power of the court "to cases which for some reason get to one court when they should be in another."

The recognition in *In Re Garesche*, *supra*, of this power of transfer under the Constitution, is approved in *Schuster v. Weiss*, 114 Mo. l. c. 172), and in *Carmody v. Transit Company*, 188 Mo. l. c. 575, where this court, after announcing that it had upon an investigation of the record, no other power, ordered the case transferred to the St. Louis Court of Appeals. In *Rourke v. Holmes St. Ry. Co.*, 257 Mo. l. c. 569, this court, speaking through *BOND, J.*, held that the power of the Legislature to pass an act providing for the transfer of cases from the Courts of Appeals to the Supreme Court is sustained solely on the ground of specific constitutional authority. This case further holds that the constitutional provision authorizing transfers is of continuing force and governs the disposition of cases not submitted when subsequent statutory changes were made under the authority of the Constitution in relation to the relative jurisdictions of the Supreme Court and the courts of appeals.

A statute of Louisiana similar in all of its material features to section 3938, *supra*, is apposite. In construing a statute authorizing the transfer of cases from the Supreme Court to a court of appeals of that State, the Supreme Court said, in substance: The court first determines whether the appeal has been properly brought up; and having found that there is an appeal to be dealt with it proceeds to determine

whether the court has jurisdiction of it; if it finds that it has not, it dismisses the case, or, under the statute, transfers it to the appropriate court. We see in this transfer no greater exercise of jurisdiction than would be required for a dismissal. The court necessarily has jurisdiction to determine whether the appeal has been brought up; that is, whether the steps for bringing it up have been properly taken. The motion, therefore, to dismiss is overruled, and the present appeal having been brought to this court instead of the court having jurisdiction, it is ordered that the case be transferred to the Court of Appeals of the Parish of Orleans. [Bolden v. Barnes, 118 La. 274.]

Like persuasive precedents might be cited from courts of last resort in other jurisdictions, sustaining statutes authorizing the transfer of cases from one appellate court to another under constitutions similar to our own. The decisive manner, however, in which this court has repeatedly ruled upon this subject as applied to the transfer of appeals, and no difference in principle existing to prevent the application of the rule to the transfer of writs of error, the further burdening of this opinion with the citation to and discussion of other cases is not necessary.

The correctness of the conclusion as to the right of transfer in the case at bar is not affected by the fact that the proceeding is based upon a writ of error instead of an appeal. The constitutional provision defining the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals, applies as well to writs of error as to appeals, and the rule announced is therefore as applicable to one class of cases as the other.

Nor does the fact that a writ of error constitutes a new suit militate against the right to transfer the case at bar. A writ of error is held to be a new suit in determining whether there is a *lis pendens* between

the rendition of the judgment in the principal case in the lower court and the suing out of the writ. The trend of authority in this regard being that after the rendition of the judgment below and before the suing out of the writ, a purchaser in good faith takes title free from the final determination of the writ of error. [Macklin v. Allenberg, 100 Mo. l. c. 342; Macklin v. Schmidt, 104 Mo. 361; Pierce v. Stinde, 11 Mo. App. l. c. 369; Mathewson v. Railroad, 44 Mo. App. 97.] Only to the extent above indicated may a writ of error properly be designated as a new suit and thus contradistinguished from an appeal which is a continuation of the original suit. In other respects, aside from the procedure necessary to obtain a writ of error, both classes of cases possess the same general characteristics, their purpose being to bring up the principal case to the appellate court for review.

Cases involving original remedial writs reviewable under the Constitution only in the Supreme Court are not within the purview of the statute (Sec. 3938, *supra*), which by its terms is confined to appeals and writs of error. For example, where a writ of mandamus has been sued out in a court of appeals and the relator in support of same pleads a constitutional question, the proceeding will be dismissed, because the court has no constitutional power to consider the same, nor statutory authority to transfer the case to the Supreme Court. [State ex rel. v. Southard, 61 Mo. App. 296.]

The consideration of cases illustrative of the superintending control of the Supreme Court in preventing the courts of appeals from exercising jurisdiction in cases reviewable only in the Supreme Court, has no place in the determination of the matter here at issue. The exercise of this power is frequent and its propriety is not questioned. While it may be invoked to prevent the improper issuance of original remedial writs, it is equally applicable to prevent any usurpa-

tion of jurisdiction. To illustrate: If the Kansas City Court of Appeals in the instant case, upon being apprised of the fact that title to real estate was involved, had not on its own motion transferred the case to the Supreme Court, the latter, in a proper proceeding, could have compelled such transfer.

From the foregoing it follows that the motion of defendant in error to dismiss this case must be overruled.

III. Dilatory matters having been disposed of, we find that not an exception was saved to any ruling of the trial court. There is no bill of exceptions or motion for a new trial or any reference to either. While the petition and the judgment, as parts of the record proper, are preserved, other matter, consisting principally of documentary evidence, has not been so preserved and presented as to authorize a review of same. Supplementing explicit statutes and the rules of this court based upon same, we have recently, in a number of well considered cases, defined the steps necessary to be taken to authorize the review of a case upon appeal or writ of error. [Coleman v. Roberts, 214 Mo. 634; Pennowfsky v. Coerver, 205 Mo. 135; Stark v. Zehnder, 204 Mo. l. c. 448; Harding v. Bedoll, 202 Mo. 625.] With these aids, a failure to so preserve the proceedings of the trial court as to insure a review of the same here, is inexcusable.

It is contended that the lands sought to be condemned are not described with certainty; in addition to the description of same in the petition, which is sufficiently definite and comprehensive to meet the requirements of a proceeding of this character, we find this admission of plaintiffs in error in regard thereto in the so-called abstract: "The petition contains a detailed description of the respective lands owned by each defendant from which said right of way for a sewer was

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to be carved, as well as a detailed description of the part to be carved from each tract for said sewer route, all of which is omitted because it would unnecessarily encumber the record." If the petition itself, as preserved in the record, did not contain a sufficient description, this admission would authorize us in determining that it conforms to the rules of good pleading in cases of this character.

The judgment is based upon this petition and conforms to the requirements of the statute (Sec. 9271, R. S. 1909) defining the course to be pursued by a city of the class here under consideration to enable it to acquire title to private land for public purposes.

The Legislature has authorized, in condemnation proceedings of this character by cities of the third class, that the owners be divested of the fee in the lands taken (Sec. 9271, *supra*). The judgment rendered herein was in conformity with this statute. A difference of opinion may exist as to the wisdom of statutes of this character when applied to the taking of lands by cities for rights of way, as in the instant case; but they violate no constitutional provision, our organic law in this regard being limited to the taking of railroad tracks. [Sec. 21, art. 2, Constitution.] The extent of the power of condemnation of private property for public use being left to the discretion of the Legislature (Union Depot Co. v. Frederick, 117 Mo. l. c. 165; Boyce v. Mo. Pac. Ry. Co., 168 Mo. l. c. 590), the validity of the judgment, so far as concerns the interest taken, is not to be questioned.

From all of which it follows that the judgment of the trial court should be affirmed and it is so ordered. All concur except *Graves, J.*, who dissents in separate opinion in which *Woodson, C. J.*, concurs.

GRAVES, J. (dissenting).—This case brings to this court a new question, and one which cannot be

lightly brushed aside. It stands conceded, or if not conceded, in fairness it must be conceded, that in the trial in the circuit court the question of title to real estate was so involved as to make the case appealable to this court. In other words, upon the record made *nisi*, the Court of Appeals would have no jurisdiction. This state of facts I consider conceded by the opinion of my learned brother WALKER. In this situation, the aggrieved party sued out a writ of error in the Kansas City Court of Appeals. That the said court had no jurisdiction of an appeal in the same case stands conceded. The defendant, however, instead of appealing to the Kansas City Court of Appeals, in a case where such court had no jurisdiction whatever, sued out in such court a writ of error. When such writ of error came on for hearing the court discovered its want of jurisdiction and certified the case here.

The question is, Can a court of appeals issue a writ of error in a case over which it has no jurisdiction absolutely, and then certify such case to this court, and thereby confer jurisdiction here? We say no, and in this we are forced to dissent to the opinion filed. If the case was one not cognizable by the Court of Appeals, that court can confer no jurisdiction upon this court by certifying it here. In a case of this kind our jurisdiction is dependent upon the jurisdiction *nisi*. It has long been ruled in Missouri that the suing out of a writ of error is the beginning of a new suit. A citation of the cases would be useless labor. To upset this fixed doctrine is a question of vital importance. Too many property rights are fixed upon this rule. It must be conceded that the Court of Appeals can institute no new suit (for such is a writ of error) in a case where title to real estate is involved. They are without jurisdiction to even take the preliminary step in such a suit. If they do institute such a suit (as they did in this case) then their action is *coram non judice*,

and void. No certificate from them can give this court jurisdiction. We might have had jurisdiction in the first instance, but by no legal analogy can we receive jurisdiction from a court which had no jurisdiction whatever. This question has too often been brought out in cases going from probate or county courts to the circuit courts.

If the Court of Appeals issued a writ of error in a case, over the subject-matter of which it had no jurisdiction, no law of this State gives us jurisdiction upon a certificate of jurisdiction from that court. We can only say, You issued an original process in a case over which you could not entertain jurisdiction, and your certificate of transfer to this court can give us no more jurisdiction than you had. It does not fall within the line of cases that you may certify here. If a case comes to your court from the circuit court which has been wrongly sent by that court to your court, then under the Constitution you can certify that case to this court. Your power to certify is expressly given. It comes from the Constitution. But that case is not this case, or any part thereof. In the case at bar you issued a writ wherein you had no right to issue one. It is your mistake and not that of a circuit court.

The Constitution provides for error upon the part of the circuit court and authorizes the Court of Appeals to transfer. That authority can not be extended (without renovating the Constitution, and courts are not engaged in that business) to cases where jurisdiction of the Court of Appeals is dependent upon steps of its own initiation rather than erroneous orders of the circuit court. Until the Constitution is rewritten we have no jurisdiction of the instant case. For these reasons, hurriedly expressed, I dissent. *Woodson, C. J.*, concurs in these views.

IN RE ESTATE OF JOSEPHINE BRINCKWIRTH
v. HARRY TROLL, Public Administrator, Appel-
lant.

Division One, January 4, 1916.

1. **PUBLIC ADMINISTRATOR: Power to Take Charge of Estate.**
The mere fact that a public administrator takes charge of an estate by filing notice in the office of the clerk of the probate court gives him no greater authority or a more secure right to administer it than he would have were he appointed by the probate court, and no greater authority or right to administer the estate than any other person appointed administrator by the probate court would have.
2. ———: **Probate of Will: After Filing of Notice.** Upon the discovery and probate of a will of deceased after the filing by the public administrator with the clerk of the probate court of notice that he has taken charge of the estate, all his authority and right to administer the estate ceases *ipso facto* and by operation of law; and an order of the probate court vacating the authority assumed by him to act is useless and unnecessary, but one appointing another suitable person administrator with the will annexed is valid. There is no reason why the statute (Sec. 47, R. S. 1909) declaring that "if, after letters of administration are granted, a will of the deceased be found, and probate thereof granted, the letters shall be revoked, and letters testamentary, or of administration, with the will annexed, shall be granted" should not apply to a public administrator who takes charge of an estate under section 305.
3. ———: ———: **Notice of Vacation of Assumed Authority.**
The order of the probate court revoking the authority of the public administrator to administer an estate, made after the discovery and probate of decedent's will, is not void on the theory that he was entitled to notice of the court's intention to make the order, for two reasons: first, because, having before the discovery and probate of the will, filed his notice with the clerk of the probate court that he had taken charge of the estate, he was already in court, and is required by law to take notice of all papers, documents, etc., filed in the case, except where actual notice is required by statute; and, second, because he had no vested right, as public administrator, to a hearing, his assumption to act being conditional upon the discovery and probate of the will, and upon that condition happening his right to further administer the estate *ipso facto* ceased, without any order of revocation.

4. **ADMINISTRATION: Priority: Discretion of Court.** Notwithstanding the provisions of section 15, Revised Statutes 1909, naming certain persons entitled to priority to administer estates, upon the discovery and probate of a will which names no one as executor, the probate court may, in the exercise of its sound discretion, and in the face of certain circumstances named in the statute, appoint the public administrator, administrator with the will annexed; but it is not compelled to appoint him, and, if some one else is appointed, no statutory right of his is violated.

Appeal from St. Louis City Circuit Court.—*Hon. Irvin B. Barth*, Judge.

AFFIRMED.

Marshall & Henderson for appellant.

(1) An order of the probate court is not necessary for the public administrator to take charge of an estate. When he files his notice his act is independent of the probate court. The filing of notice in the office of the clerk of the probate court is sufficient to vest him with administration and he is not required to set out or prove facts which give him a right to administer. His relation to the estate thereafter is the same as if he had taken charge under order of the probate court. *Vermillion v. LeClare*, 89 Mo. App. 55; *Leeper v. Taylor*, 111 Mo. 312; *In re Hill*, 102 Mo. App. 620; *Tittman v. Edwards*, 27 Mo. App. 495. (2) Where an executor is disqualified or renounced, administration is granted the same as if there were an intestacy. In the absence of heirs entitled to preference, the public administrator must be appointed. *In re Garber*, 74 Cal. 338; *In re Richardson's Estate*, 120 Cal. 344; *Speckles v. Public Administrator*, 1 Demarest's Rep. (N. Y.) 475; *Anderson Committee v. Anderson*, 170 (Ky.) S. W. 213. (3) The right of the public administrator to administer as administrator with the will annexed is superior to the nominee of the next of kin disqualified to administer. *In Matter of Blank*, 2 Redf. Rep. 443. (4) The

probate court may appoint the public administrator notwithstanding an expressed wish of deceased, or next of kin, for appointment of another. In re Morgan Estate, 53 Cal. 243; Estate of Hyde, 64 Cal. 228; Hendlee v. Cloud, 51 Mo. 301. (5) The public administrator has authority to take charge of an estate under the Missouri statutes, and he continues in charge until superseded by one having a superior right to administer. Car & Foundry Co. v. Anderson, 211 Fed. 301; Richardson v. Busch, 198 Mo. 175. (6) The public administrator has a right to continue administration upon an estate, notwithstanding the probate court had appointed some one else administrator and had ordered him to turn over the estate to the administrator appointed. Warren v. Carter, 92 Mo. 288; State ex rel. v. Holman, 93 Mo. App. 611. (7) The public administrator is an officer within the purview of the Constitution. His authority to administer is a right conferred upon him by law. The Constitution provides that no person shall be deprived of property without due process of law. Due process of law is construed to be a reasonable notice and opportunity to be heard in defense of one's rights. The right to exercise the office of public administrator in administering estates is a right which constitutionally cannot be taken away without notice and an opportunity to be heard in defense of his rights. This is a rule of law even where the statute fails to provide for notice. State ex rel. v. Holcamp, 245 Mo. 655; State ex rel. v. Walbridge, 119 Mo. 383; State ex rel. v. Maroney, 191 Mo. 531; Hunt v. Searcy, 167 Mo. 170.

Schnurmacher & Rassieur for respondents.

If, after granting of letters of administration on the ground of intestacy, a will of the decedent be duly proved up and admitted to probate, the letters of administration are thereby revoked; or, at least, must be revoked and the powers of the administrator cease.

Thomas v. Morrisett, 76 Ga. 384; Re Davis Estate, 11 Mont. 196; Dalrymple v. Gamble, 66 Md. 298; 1 Woerner's Am. Law of Adm., sec. 268.

WOODSON, J.—The statement of the facts of this case is very brief and as well or better made by counsel for respondent than I can do, and for that reason I adopt it as my statement of the case, which is as follows:

This is an appeal from the judgment of the circuit court of the city of St. Louis, approving the action of the probate court of said city in vacating the authority of Harry Troll, then Public Administrator, and thereupon appointing John G. Grone and Henry Griesedieck, Jr., administrators, with the will annexed, of the estate of Josephine Brinckwirth, deceased.

Josephine Brinckwirth died March 29, 1911. She was a resident of the city of St. Louis at that time and left an estate which, it was admitted upon the trial, exceeds \$200,000 in value. She was a widow and her heirs at law were three minor children. John G. Grone, one of the respondents, is a brother of the deceased, and Henry Griesedieck, Jr., the other respondent (who died pending this appeal), was a brother-in-law of the deceased.

On March 30, 1911, Harry Troll, as Public Administrator of the city of St. Louis, filed notice that he took charge of the estate of said decedent, doing so on the supposition that she had died intestate.

On the next day, March 31, 1911, the will of Josephine Brinckwirth was presented for probate and was duly admitted to probate by the probate court of the city of St. Louis; and the will having been so admitted of probate, under section 47, Revised Statutes 1909, the court vacated the authority assumed by the Public Administrator, and appointed Grone and Griesedieck as administrators, with the will annexed, and they duly qualified as such.

Thereupon the Public Administrator took an appeal to the circuit court. In that court a trial *de novo* was had, with the result that the circuit court took the same action which had been taken by the probate court, and refused to set aside the appointment of Grone and Griesedieck. After an unavailing motion for new trial, the Public Administrator brought the case here by appeal.

Section 47 of the Administration Act, above referred to, reads as follows:

"If, after letters of administration are granted, a will of the deceased be found, and probate thereof granted, the letters shall be revoked, and letters testamentary, or of administration, with the will annexed, shall be granted."

I. There are but two legal propositions presented by this record for determination, and counsel for Public Administrator. appellants present their side of the first in the following language:

"An order of the probate court is not necessary for the Public Administrator to take charge of an estate. When he files his notice his act is independent of the probate court. The filing of notice in the office of the clerk of the probate court is sufficient to vest him with administration and he is not required to set out or prove facts which give him a right to administer. His relation to the estate thereafter is the same as if he had taken charge under order of the probate court.

"The Public Administrator has authority to take charge of an estate under the Missouri statutes, and he continues in charge until superseded by one having a superior right to administer."

In support of their position the following authorities are cited: Vermillion v. LeClare, 89 Mo. App. 55, l. c. 60; Leeper v. Taylor, 111 Mo. 312; In re Estate of Hill, 102 Mo. App. l. c. 620; Tittmann v. Edwards,

27 Mo. App. 495; *American Car & Foundry Co. v. Anderson*, 211 Fed. 301; *Richardson v. Busch*, 198 Mo. 174.

These cases, with the exception of the Hill case, substantially hold what is contended for by counsel for appellant; but notwithstanding the ruling there announced the mere fact that the Public Administrator took charge of the estate mentioned under section 305, Revised Statutes 1909, and undertook to administer it, certainly gave him no greater authority or more secure rights in that regard than he would have acquired had he been appointed by the probate court under section 9, Revised Statutes 1909.

That being true, then in my opinion, the position of counsel for appellant is not inconsistent with, nor does it militate in the least against the contention of counsel for respondent regarding this proposition, which is stated in this language:

"If, after granting of letters of administration on the ground of intestacy, a will of the deceased be duly proved and admitted to probate, the letters of administration are thereby revoked; or at least must be revoked and the powers of the administrator cease."

This contention of counsel is precisely what section 47, Revised Statutes 1909, provides shall be done when the ordinary administrator is appointed, and subsequent thereto a will is discovered and duly admitted to probate.

This statute seems to be so clear in meaning that there can be no room for construction. However, similar statutes of other States have been before the courts of those States, which hold they mean just what they say. [*Thomas v. Morrisett*, 76 Ga. 384; *Re Davis' Estate*, 11 Mont. 196; *Dalrymple v. Gamble*, 66 Md. 298; 1 *Woerner's American Law of Administration*, sec. 268.]

And as previously stated, there is no rule or reason why this same statute should not also apply to a

public administrator who takes charge of an estate under said section 305. [State ex rel. v. Wilson, 216 Mo. 215; Tarkio Drainage District v. Richardson, 237 Mo. l. c. 64.]

This proposition is therefore ruled in favor of the respondent.

II. Counsel for appellant next insist that the order of the probate court revoking the authority of the

Notice. Public Administrator to administer the estate was void because he was not notified of the court's intention to make the order.

This insistence is clearly untenable, for two reasons: first, because he was in court all the time, and had to take notice of all papers, documents, etc., filed in the case where actual notice is not expressly required by statute.

In this case the will was filed, proved and duly probated; and there is no statute which in express terms or by necessary implication required appellant to be notified of said contemplated order.

The second reason why appellant was not entitled to such notice is because he had no vested right, as such Public Administrator, which entitled him to a hearing. His appointment, as such administrator, or rather his assumption of authority under the statute to act as such, was conditional, which depended upon the subsequent discovery and probate of the will referred to in said section 47; and when that contingency happened his right to further administer the estate under section 305 ceased *ipso facto*, and he could proceed no further therewith, for the obvious reason from that time on the estate had to be administered according to the terms of the will and not according to any statute, and before that could be done letters testamentary or of administration with the will annexed had to be issued by the probate court before anyone

could lawfully proceed further with the administration.

While the probate court, in such a case, if not prohibited by sections 15 and 19, Revised Statutes 1909, the first providing for the priority of persons entitled to administer upon estates, and the second prescribing when letters testamentary with the will annexed shall be granted, the probate court may in its sound discretion issue letters of administration with the will annexed to the public administrator, yet there is no law which commands or reason which suggests that such should be done as a rule. In individual cases, under certain circumstances, the court might very justly select him instead of anyone else connected with the estate or the parties interested therein. But by no means does that follow as a matter of law. In such cases as this, and in all cases arising under said section 47, the probate court is at liberty to exercise its wise and sound discretion as to whom it will grant letters of administration with the will annexed, limited, of course, by the provisions of sections 15 and 19, before mentioned.

While the probate court of the city of St. Louis, as a matter of form, or probably for the purpose of making its record fair upon its face, made the useless order revoking the authority of the appellant to proceed further with the administration of the estate after the probate of the will, yet it is perfectly clear that no such order of revocation was necessary, for the reason before stated, that when the will was probated, then by operation of said section 47, his authority to further act ceased *ipso facto*. This being unquestionably true, as it seems to us, then it would be idle talk and illogical to contend that the appellant was entitled to notice of the court's intention to make said formal order for the purpose of keeping its records fair.

In discussing the same question the Supreme Court of Montana, in the case of *Re Davis' Estate*, supra, l. c. 213, said:

"While the law required inquiry to be made as to whether decedent left a will, and makes the right to grant letters of general administration dependent on the fact that according to the proof obtainable decedent left no will [which is also the case in Missouri], it does not require that the court shall solemnly determine by judgment that decedent died intestate. For the statute leaves the question open for the propounding of a will at any time, and the admission of a will to probate, *ipso facto*, supersedes and vacates the grant of letters of general administration."

And in the case of *Thomas v. Morrisett*, 76 Ga. 384, syl. 3, the Supreme Court of Georgia held that:

"No general administration upon an estate should have been granted in this State, where there was a will in existence which was afterwards proved and admitted to record; and if such administration has been granted in this State, and afterwards a will has been established, this would work a revocation, except as to such portions of the estate as had been fully administered prior to the production and probate of the will."

In the last case cited a general administration had been granted and afterwards a will was produced which had been admitted to probate in the State of Alabama. This raised the question of the validity of the order granting said administration. At page 388 of its opinion the court says:

"Conceding to this judgment in our courts the full faith and credit to which it is entitled by the law and usage of the courts of Alabama, we agree with the superior court that no general administration should have been granted on an estate when there was a will in existence, which was afterwards proved and admitted to record. This is a well settled principle,

recognized both by judicial decisions and text-writers. In *Fields v. Carlton*, decided at the last term of this court, 75 Ga. 554, we held that, where a will had been proved in this State, a grant of administration upon the estate was void, and to this effect was the decision of the Supreme Court of the United States in *Griffith v. Frazier*, 8 Cranch, 9, and to these many others might be added, but it would be unnecessary labor, as there is not an authority which questions the point there ruled. Applied to an administration granted before a will, which was afterwards established, was discovered, the same principle would work its revocation, except as to such portions of the estate as had been fully administered prior to its production and probate."

The same ruling was announced by the Supreme Court of Maryland in the case of *Dalrymple v. Gamble*, 66 Md. 298. The facts in that case sufficiently appear in the first syllabus (7 Atl. 683), which reads as follows:

"Where, after the appointment in Maryland of an administrator upon the estate of a resident of California, a will, which named no executor, was established and probated in California, and a copy of it was filed in the orphans' court in Maryland, which had granted administration, held, that that court had the power, in its discretion, to revoke the former letters of administration, and issue letters of administration *cum testamento annexo*, although the statute provides only for revocation of letters of administration by the issue of letters testamentary; and that such power was properly exercised without awaiting the result of a suit in equity brought by the heirs and next of kin, who claim that the devise made by the will was void, and did not operate upon the Maryland property, to determine the effect of the will."

Discussing the legal question presented, in its opinion, that court said:

“The questions for our decision may be divided into two. The first is whether when this duly certified copy of the will, probated in California, was filed, the letters before granted to Augustine [Dalrymple] were properly revoked. . . . The answer to the first question depends upon sections 36 and 327 of article 93 of the Code. Section 36 is explicit in saying that if a will is filed, and the executor therein named shall apply within thirty days after the filing for letters testamentary, they shall be granted, and the granting of such letters shall operate as a revocation of letters of administration previously granted. Under those circumstances the orphans’ court would have no discretion in the matter. But the law is silent as to what shall be done when there is no executor named, although a will is filed. This section 36 makes no distinction between a foreign and a domestic will, and we can see no reason why any distinction should be made; and when we take into consideration section 327, we think none should be made. The will in this case is a foreign will, and professes to dispose of all the personal property; but it appoints no executor, and it is not a case, therefore, where the orphans’ court are compelled to revoke. But the whole policy of our testamentary system is to commit administration to the hands of those most interested in the property. Had a will like the one in this case been filed before any administration had been granted, the orphans’ court would surely have granted letters c. t. a., but not the ordinary letters of administration. But the power of the orphans’ court to revoke letters improvidently granted is unquestioned. We can see no reason why that court should not have the discretion to revoke letters previously granted, and grant new letters c. t. a., upon the discovery of a will. . . . The power to administer justice would be seriously impaired if that court possessed no power or discretion to revoke let-

ters that it had previously granted upon a mistaken state of facts.'

While in the case of *Tapley v. McPike*, 50 Mo. 589, the question was whether or not the statute of itself, upon the probate of the will, revoked the former appointment of the administrator, or whether an order of court was necessary for that purpose; yet there the general effect of the statute was recognized and enforced in the same manner as those referred to in the cases cited.

For the reasons stated this proposition is decided against the appellant.

And for the same reason it would be equally illogical to contend or hold that the appellant would be entitled to an appeal from such a useless or formal order.

I am, therefore, clearly of the opinion that the judgment of the circuit court should be affirmed; and it is so ordered. All concur; *Bond, J.*, in paragraph one and the result.

CITY OF MACON, Appellant, v. JOHN M. ATKINSON et al., Constituting PUBLIC SERVICE COMMISSION, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

Division Two, January 4, 1916.

1. **PUBLIC SERVICE COMMISSION.** The Public Service Commission is not a court.
2. ———: **Appeal.** On appeal from the rulings of the circuit court, requiring the Public Service Commission to receive evidence which it had refused to receive, it is the rulings or errors of the court that are for review, and not those of the commission.
3. ———: ———: **No Evidence.** In the absence from the record of the evidence adduced before the circuit court there

City of Macon v. Public Service Commission.

can, on appeal, be no review of its rulings: (a) where the circuit court, upon *certiorari*, had affirmed the action of the Public Service Commission and approved its admission of evidence; or (b) where the circuit court had reversed and remanded the case to the commission for errors in refusing to admit relevant and competent evidence; or (c) where, upon the facts adduced in evidence, the finding of the commission was erroneous as a matter of right and equity and good conscience.

4. ———: ———: ———: No Motion for New Trial: No Bill of Exceptions. The statute makes the appellate procedure pertaining to appeals in civil cases applicable to appeals from the rulings of the circuit court affirming, upon *certiorari*, the action of the Public Service Commission; and unless the evidence before the circuit court is preserved in a bill of exceptions, and kept alive by a motion for a new trial, there is nothing for review on appeal to the Supreme Court except the bare record of the proceedings in the circuit court. Even though the case be denominated one in equity, there can be no review of the evidence, unless there is both a motion for a new trial and a bill of exceptions.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*,
Judge.

AFFIRMED.

W. G. Busby, O. M. Spencer and M. G. Roberts for respondents.

The Public Service Commission Act provides that causes of action taken by writ of *certiorari* to the circuit court from the Public Service Commission shall be tried as suits in equity. It is further provided that such causes shall be appealed as in other cases. There is nothing for this court to review in this case, as the appellant did not file a motion for a new trial or a motion in arrest of judgment. The Public Service Commission Act does not dispense with the necessity of such motions required in all other civil cases.

George N. Davis, D. L. Dempsey and Andrew Field for appellant.

There was no provision nor place in appeals from the Public Service Commission for motion for new trial

in the circuit court. The motion for rehearing before the commission takes the place of the motion for new trial. Section 110 of the Commission Act provides: "After an order or decision has been made by the commission any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted the same shall be determined by the commission within thirty days after the same shall be finally submitted. No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or person or public utility unless such corporation or person or public utility shall have made, before the effective date of such order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. No corporation or person or public utility shall in any court urge or rely on any ground not so set forth in said application." Section 111 provides for writ of *certiorari* or review for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined, and further provides "No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. The commission and each party to the action or proceedings before the commission shall have the right to appear in the review proceedings. Upon such hearing the circuit court shall enter judgment either affirming or setting aside the or-

der of the commission under review. Section 114 provides for appeal to the Supreme Court. "Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this act. The original transcript of the record and testimony and exhibits, certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the Supreme Court. . . . No appeal shall be effective when taken by a corporation, person or public utility unless a cost bond of appeal in the sum of five hundred dollars shall be filed within ten days after the entry of judgment in the circuit court appealed from." Accordingly under the statute, this whole record is here for review by this court. And no point is made upon any action other than as it appears in this record.

FARIS, P. J.—Appeal from the judgment of the circuit court of Cole county affirming the action of the Public Service Commission of the State of Missouri in a proceeding by appellant to compel defendant railroad company to repair certain overhead crossings of the streets of plaintiff city over the railroad track of defendant railroad.

Since, in the view we are compelled to take of the case, it does not turn here upon the facts, a brief statement of such facts will suffice. Concisely they run thus: At a former time, to-wit, in the year 1901, defendant railroad company was desirous of lowering the grade of its track where the same ran through plaintiff city and where it crossed over Wentz street and Ruby street therein. In order to lower this grade defendant railroad (hereinafter for brevity referred to simply as the railroad) made a contract with the city of Macon (hereinafter designated for brevity as

the city), whereby it was agreed that the railroad should construct and keep in repair bridges over its said tracks where the same crossed said above-named streets. This contract further provided that the railroad should pay to the city as part consideration, at least, for the right of lowering such tracks and the grade through said city the sum of \$8,500. It was further agreed that the city should assume the burden of keeping in repair the approaches to and the floors on said bridges, which approaches and floors constituted the streets, or passageways on Wentz and Ruby streets where the latter crossed the railroad tracks. This contract took the form of an ordinance, which ordinance was duly accepted by the railroad and the said sum of \$8,500 paid to and accepted by the city.

In the course of time the flooring over the two bridges in question became rotten and out of repair, which necessitated the reflooring of same and the construction of new approaches on said streets to these two bridges. Thereupon the city took the position that it was not its duty to maintain and repair these floors and approaches, but that it was the duty of the railroad so to do, its legislative contract with the railroad notwithstanding. It thereupon proceeded to repudiate this contract on the theory that the same is *ultra vires*, and that it was and is the duty of the railroad under section 3049, Revised Statutes 1909, to repair and maintain both the approaches to these bridges and the floors thereon.

Upon a hearing before the Public Service Commission the complaint of the city was dismissed for the reason, among others, that the evidence in the case did not warrant the granting of the relief prayed for. From this order and ruling of the Public Service Commission appellant herein brought *certiorari*, or a writ of review, in the circuit court of Cole county to bring up the record of the case from the Public Service Commis-

sion. Upon a hearing in said circuit court the ruling of the Public Service Commission was in all things affirmed. From this judgment of the circuit court the city, which is appellant here, took an appeal to this court. In taking this appeal no motion for a new trial, or motion in arrest, or any other motion was filed, nor was any bill of exceptions filed in the case; nor was any time taken in the court *nisi* within which to file such bill of exceptions. A plain, bare appeal from the circuit court was taken merely by making the statutory affidavit and giving a *supersedeas* bond as in ordinary appeals in civil cases.

Such further facts as shall become necessary to make the points clear will be set forth in the subjoined discussion.

OPINION.

Many contentions are urged by the appellant, but we are met upon the threshold with respondent's insistence that there is nothing before us but the bare record of the proceedings in the circuit court. This contention is bottomed upon the admitted failure of the appellant to file in the circuit court any motion for a new trial. Appellant took a bare appeal from the decision below, which was adverse to it. We need not cite authorities to prove that such a failure would have the effect in any ordinary civil case to preclude any review here in any wise based upon the evidence. Unless then there be some valid statute which prescribes, or permits a special and different procedure in a case coming up to us on appeal from a circuit court from a ruling made by the Public Service Commission, we must affirm this case out of hand, absent error in the record proper.

Turning to the statutory provisions which govern cases coming up from the Public Service Commission,

**Appeal:
No Bill of
Exceptions:
Review of
Evidence.**

we find it recited that in all cases of appeals to this court "such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases, except as otherwise provided in this act. The original transcript of the record and testimony and exhibits certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, *together with a transcript of the proceedings in the circuit court*, shall constitute the record on appeal to the Supreme Court." [Sec. 114, Laws 1913, p. 644.] Elsewhere it is provided in this act that matters shall be brought up to the circuit courts by writs of *certiorari*, or writs of review, and that upon reaching the circuit courts the cases so brought up "shall be tried and determined as suits in equity." [Sec. 111, p. 641, Laws 1913.] If upon the hearing in the circuit court such court shall find that the commission failed "to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken and such as it is directed to receive." [Ibid.] From such action of the circuit court an appeal lies to this court—at least it is so nominated in the act—on behalf of whomsoever, being a party to the case, may be injured by the ruling of the circuit court. On such appeal, whether the error urged upon us be that of a wrong interpretation of the evidence, or a wrong finding upon the weight thereof, or an erroneous ruling upon the reception of evidence offered, it is plain we can look only to the error of the circuit court. We can not in a strictly legal sense weigh the alleged judicial errors of a non-judicial and merely administrative body. We can only so weigh the acts of courts. The Public Service Commission is not a court. If it were a court then its organization as such would be in the very teeth of the Constitution. [Sec. 1, art. 6, Constitu-

tion of Missouri; Constitution of Missouri, secs. 2 and 3, Amendment 1884.] If then the circuit court shall require the commission to receive evidence which such commission theretofore refused to receive, and if from the action of the circuit court an appeal be brought here (as may be done) on the theory that the commission was right and the circuit court was wrong, the inquiry is pertinent as to whose error is being reviewed here. Clearly, if error be present, it is strictly speaking the error of the circuit court. Such is the fundamental and underlying principle of appellate procedure. [Hall v. Harris, 145 Mo. 614.]

These conditions are presented then: (a) There may be an appeal in a case affirmed, where there would of necessity be no errors of the circuit court in ordering the admission of evidence; (b) there may be an appeal in a case wherein the circuit court for errors in refusing to admit relevant and competent evidence, reversed and remanded the case to the commission, and where the sole error committed would be that committed by the circuit court; and (c) we suggest *arguendo*, an appeal in a case wherein upon the facts adduced in evidence, the finding of the commission was erroneous as a matter of right and equity and good conscience.

In each of these three classes we would be unable to review the action of the trial court absent the evidence in the case. Under the rule in the appeal of civil cases, to which the plain letter of this statute relegates us for the appellate procedure which is to govern us, the evidence is not preserved for review unless through a bill of exceptions, kept alive by a motion for a new trial. [Thompson v. Child, 6 Mo. 162; St. Louis v. Lawton, 189 Mo. 474; Watson v. Pierce, 11 Mo. 358; Woodson v. McClelland, 4 Mo. 495; Keaton v. Keaton, 74 Mo. App. 174; Berry v. Rood, 209 Mo. 662; 29 Cyc. 739, 740.] And such motion is just as much a requisite

to an appellate review of the evidence in an equity case as it is in one at law. [Berry v. Rood, *supra*; Keaton v. Keaton, *supra*; Woodson v. McClelland, *supra*.] Absent a motion for a new trial, absent the bill of exceptions, and absent a bill of exceptions, no appellate review here can be had, which is based upon the evidence in 'he case, or upon errors in admitting or in refusing to admit evidence. However, in the instant case there is neither a motion for a new trial nor a bill of exceptions.

It is perhaps regrettable (if the desirability of uniformity referred to *infra* does not outweigh the regret), that an attempted simplification of the appellate procedure should thus come to naught. The trouble lies in the plain letter of the statute, which recognizing that appeals and appellate procedure "live and move and have their being" solely by virtue of statutes and not otherwise, yet plainly ordains that appeals in cases from the Public Service Commission "*shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this act,*" and then signally fails to provide any modification of the procedure, even by fair implication.

Pretermittting the question whether it is wise to have one sort of appellate practice in one kind of civil cases and another sort in all other kinds of civil cases, as likewise the question whether such a special practice would or would not contravene the provisions of section 53 of article 4 of the Constitution, we are yet compelled to say that absent a motion for a new trial, as in the instant case, we can review nothing but the record proper. Finding no error therein, we affirm the case. *Walker, J.*, concurs; *Revelle, J.*, not sitting.

THE STATE v. ALBERT KATZ, Appellant.

Division Two, January 4, 1916.

1. **CRIME AGAINST NATURE: Embraced by Statute.** The statute (Laws 1911, p. 198) declaring that "every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished," etc., makes criminal the act of a man in wickedly and feloniously inserting his sexual organ into the mouth of a woman. Whether or not such act was at common law included in the general terms "crime against nature" is beside the question in view of the words "with the sexual organs or with the mouth" added to the statute in 1911, which were intended to include certain acts which the general common-law terms did not embrace, among others the said act.
2. **EVIDENCE: Of Collateral Crime.** Evidence of a collateral crime which has a logical connection with the crime directly involved and is so linked with it as to constitute it a part of the continuous accomplishment of a fixed and common design, is admissible. So that where defendant is charged with the abominable crime against nature and the evidence shows that, while prosecutrix and a man were seated in a park near midnight they were accosted by defendant and two accomplices, who falsely represented themselves as private detectives, and while the accomplices, under the guise of an arrest, took the man to one end of the park, the defendant forcibly took her to another part and there ravished her and after forcibly detaining her for sometime inserted his sexual organ in her mouth, evidence that, after the accomplices had returned and they had outraged her in the same way, the three took her to the rear of an abandoned saloon, an hour and a half or two hours after they had first accosted her in the park, and there again assaulted her in the same way, was admissible, to establish a conspiracy and to prove that all that was done was but a part of a fixed, single and common design.
3. ———: ———: **Motion to Elect.** Nor was it error on the part of the trial court to refuse to compel the State, after the evidence of the second assault was in, to elect upon which assault it would go to the jury.
4. **CRIME AGAINST NATURE: Consent as Defense: Instruction.** Consent on the part of the woman to the insertion by defendant of his sexual organ in her mouth is no defense to a charge of the detestable and abominable crime against nature; nor can an instruction which tells the jury that it was immaterial whether

the person so used or abused consented thereto or not, be condemned as unnecessary, or as erroneous, on the ground that, if prosecutrix consented, she was an accomplice, in which event corroboration of her testimony was necessary, in a case in which there is no evidence tending to show consent, and corroboration therefore was unnecessary, and the motion for a new trial contains no specific assignment on the subject.

5. ———: **Incredible Evidence.** Although the facts of a case reveal such a state of degradation and indecency as to challenge credulity, they will not be held to be incredible and opposed to human experience, if prosecutrix's testimony is corroborated and the punishment imposed by the verdict is so moderate as to relieve the jury of every imputation of passion and prejudice; for legislative enactments against crimes against nature and the transcripts of courts attest the fact that such crimes are within human experience.

Appeal from St. Louis City Circuit Court.—*Hon. Kent K. Koerner*, Judge.

AFFIRMED.

John A. Gernez for appellant.

(1) Sec. 4726, R. S. 1909, as repealed and re-enacted, Laws 1911, p. 198, does not make the acts alleged in the information or testified to in the evidence a criminal offense. It was not an offense at common law, nor under this statute, nor is there any other statute applicable. (a) In determining the meaning of the words "the abominable and detestable crime against nature," we must have recourse to the common law. In interpreting the criminal statutes, which fail to define the denounced offense, common law definitions of crimes must guide us. *State v. Rader*, 262 Mo. 129; *Potter's Dwarrior on Statutes*, p. 186; 8 Am. & Eng. Ency. Law, 276; *Brandon v. Carter*, 119 Mo. 572; *United States v. Miss. Freight Assn.*, 58 Fed. 58; *Ex parte Vincent*, 26 Ala. 145; *Comm. v. Chapman*, 13 Metc. (Mass.) 68; *State v. Hartley*, 185 Mo. 669; *State v. Cowley*, 67 Vt. 322; Sec. 8047, R. S. 1909. (b) At common law "the detestable and abominable crime

against nature" was clearly and distinctly defined. It was either sodomy or buggery. The act complained of in the information or proved by the testimony is not included in the term "the detestable and abominable crime against nature." It is neither of these offenses. 1 East's P. C. c. 14, sec. 1; 1 Russell on Crimes, 976-978; 1 Wharton, Cr. Law, sec. 575; 2 Bishop, Cr. Law, 1194; Rex v. Jacobson, Russ. and Ry. 133; People v. Boyle, 116 Cal. 658; State v. Prindle, 31 Tex. Cr. 551; State v. Harvey, 55 Tex. Cr. 199; State v. Tondexter, 133 Ky. 720; State v. Kennan, 86 Neb. 234; Terr. v. Weaves, 127 Pac. 724; State v. Mitchell, 49 Tex. Cr. 535; McClain, Crim. Law, sec. 1153. (2) Each act of so-called sodomy, testified to by the prosecutrix, constituted a separate, distinct and substantive offense. State v. Palmberg, 199 Mo. 240; State v. Schenk, 238 Mo. 457; State v. Prewitt, 202 Mo. 51; State v. Wilkins, 221 Mo. 444. (a) If the defendant was being tried for the first affair at Benton Park, then all evidence of the second affair at the Cherokee Brewery was inadmissible. State v. Palmberg, 199 Mo. 240; People v. Molineux, 62 L. R. A. 332; People v. Clark, 33 Mich. 112. (b) If the defendant was being tried for the second alleged affair, then probably evidence of the first offense was admissible but it was the duty of the court to properly instruct the jury as to the admissibility and purpose of such testimony. Instruction 7 did not accomplish this and on defendant's special exception to this instruction, a proper one should have been given. (c) Motion of the defendant for an election upon the part of the State was timely and would have remedied many of the errors complained of. Indeed a motion to elect was unnecessary. The State was presumed to proceed on the first case. State v. Prewitt, 202 Mo. 51; State v. Palmberg, 199 Mo. 248; State v. Castro, 113 Cal. 11; People v. Baker, 105 Ill. 452; People v. Jenness, 5 Mich. 457;

State v. Acheson, 91 Me. 240; State v. Richardson, 63 Ind. 192; State v. Schenk, 238 Mo. 457; People v. Williams, 133 Cal. 168; People v. Clark, 133 Mich. 112; People v. Mitchell, 24 Colo. 532. (d) It was error for the court, even if no motion for an election had been made, to submit to the jury two separate and distinct offenses. We cannot tell from the verdict of which of these offenses he was convicted. Cases just above cited and also State v. Washington, 242 Mo. 409. (3) The verdict was not supported by the evidence. "And in proportion as the crime is most detestable, so ought the proof of guilt to be clearest and most undoubted." 1 East's Pleas, chap. 141, sec. 1; 4 Black. Comm., 215; Honselman v. People, 168 Ill. 172. (4) Instruction number 1 is erroneous in the use of the language, "It is not material whether the person so used or abused consented or not." It was unnecessary to give this instruction but as given it is erroneous for it is most important if the victim is a consenting party. If she consented, then she became an accomplice, whose testimony must be corroborated. State v. Wilkins, 221 Mo. 444; Madis v. State, 27 Tex. App. 194; Regina v. Jellyman, 8 C. and P. 604; People v. Miller, 66 Cal. 468; Comm. v. Snow, 111 Mass. 411; People v. Dechessiere, 69 N. Y. App. Div. 217.

John T. Barker, Attorney-General, and *Lee B. Ewing*, Assistant Attorney-General, for the State.

(1) The information charges a felony under the statute, Laws 1911, p. 198, and is sufficient. State v. Wellman, 253 Mo. 311; State v. Kelly, 192 Ill. 119; State v. Honselman, 168 Ill. 172; State v. Means, 125 Wis. 650. (2) The court did not err in refusing to compel the State to elect, nor in its instructions numbered 3, 4, 5 and 6. State v. McDonald, 67 Mo. 13; State v. Balch, 136 Mo. 109; State v. Sykes, 191 Mo. 62; State v. Mathews, 98 Mo. 127; State v. Schnettler, 181 Mo.

State v. Katz.

189; *State v. Greenwade*, 72 Mo. 299. (3) The evidence was ample to sustain the verdict. *State v. Sechrist*, 226 Mo. 574; *State v. McKinney*, 254 Mo. 697. (4) There was no error in the failure of the court to require the State to elect as to the particular offense. There was but one offense. The whole was one transaction. It is clear that appellant and his companions, Gausman and Long, entered into a conspiracy to represent to the prosecutrix and Schonberg that they were detectives, and go through the form of arresting the girl and her companion, and thereby separate them, and then assault the prosecutrix. The conduct of appellant and his companions will admit of no other explanation. In pursuance of this conspiracy, they did pretend to arrest prosecutrix and Schonberg and the latter was taken away by Long and Gausman while Katz assaulted the girl. Then the trio succeeded in getting rid of Schonberg entirely and Long and Gausman each then attacked the girl. Clearly these transactions constituted but one offense. True, each of the men might have been informed against separately and separately tried; but all might also have been convicted for the act of any one of them. *State v. Sykes*, 191 Mo. 62; *State v. Greenwade*, 72 Mo. 299. Within a few minutes of the close of the transaction in the park, prosecutrix was then taken by the three men to the saloon at Cherokee and Jefferson streets, two blocks away, and from there to the old Cherokee brewery, at Cherokee and Iowa streets, three blocks further on. During all that time prosecutrix was in the power of appellant and his companions. They either had hold of her, or she was surrounded by them and under their will and control. If appellant and his companion had remained with prosecutrix in the park, and again committed the acts testified to by her in 20 to 30 minutes after the first assaults, clearly it would have been but one continuing offense, notwithstanding there

were many criminal bestial acts. Does it in anywise alter the case, that instead of again committing the acts near the lake in the park, they took the girl five blocks away to another place before committing them? It was all done in pursuance of a formed purpose. The parties were never separated. The interval was but a few minutes. The whole was but one continuing transaction. The facts are so related as to constitute but one offense. To hold otherwise would be to apply the linear three-foot rule as the standard by which to determine the propriety of a motion to elect or to distinguish between different offenses. The question then becomes, How many yards apart were the different transactions? It is no longer a question of whether or not the accused has been informed of the charge against him. *State v. Matthews*, 98 Mo. 127; *State v. McDonald*, 67 Mo. 13; *State v. Sykes*, 191 Mo. 62; *State v. Balch*, 136 Mo. 109; *State v. Schnettler*, 181 Mo. 189; *State v. Greenwade*, 72 Mo. 299.

REVELLE, J.—By information filed in the circuit court of the city of St. Louis it is charged that the defendant “did wickedly, feloniously, and against the order of nature, commit the detestable and abominable crime against nature with one Mary Emmenger, a female person, by then and there wickedly and feloniously inserting and thrusting the sexual organ of him, the said Albert Katz, into the mouth of her, the said Mary Emmenger; the said Albert Katz being then and there a male person.”

Defendant was tried and convicted and his punishment assessed at imprisonment in the penitentiary for a term of two and one-half years.

The State's evidence, in substance, is that about 11 or 11:30 on the night of August 5, 1913, the prosecutrix and one Harry Schonberg, who had been acquaintances for years, were seated in Benton Park, where

they were accosted by defendant and two companions, Harry Long and Richard Gausman, who falsely represented themselves to be private detectives. Long and Gausman seized Schonberg, and, under the guise of arrest, took him to one end of the park, while defendant forcibly and against her resistance took prosecutrix to the other side of the park, near a lake, and there ravished her. After the act of sexual intercourse was completed he forcibly detained her for sometime and then committed the unnatural crime alleged in the information. He then turned her over and inserted his private parts in her rectum. These transactions consumed about forty-five minutes, and just about the time they were finished Long and Gausman appeared and, in turn, and with the assistance of defendant, assaulted and mistreated the girl in the same manner as had the defendant. Their acts occupied about thirty or forty minutes. After this they took the girl to a saloon about two blocks from the scene of the first assault and there purchased for her a glass of soda. It was then about one o'clock, and from this saloon they proceeded to the rear of an abandoned brewery, about three blocks distant, and there again assaulted her as they had in the park. The evidence discloses that but a very short time elapsed between the occurrences in the park and those at the brewery, in fact only the time required to travel from point to point and stop at the saloon to purchase the soda. After the last assault prosecutrix went to the corner of Cherokee and Jefferson streets and there met an officer to whom she made complaint concerning her mistreatment. While in his company she met another police officer who took her to the police station, and from there to the city dispensary where a physical examination was made. In the presence of the police captain, certain other officers, and the defendant himself, prosecutrix, immediately after arriving at the police station, recited her

story, as heretofore detailed, which was then and there denied by defendant.

The evidence further discloses that when the prosecutrix met the police officers her clothing was soiled and torn. The physician who made the examination testified that "the vagina was excoriated or reddened and irritated inside and around the edges and greatly relaxed; that her rectum was similarly affected, and that her clothing was soiled from vaginal discharge."

On the part of defendant the testimony tends to prove that the defendant was not with the prosecutrix on the occasion testified to, nor was he with her at all in the park or at the brewery. He denied all the statements of the prosecutrix, and offered evidence tending to establish that he was engaged in the performance of his regular duties as a bartender until 12:45 that night. He admitted that immediately after quitting work he saw the prosecutrix and walked with her to a saloon and there got a glass of soda, but denied entirely that he had committed any assault, or that any had been committed upon prosecutrix in his presence.

I. The judgment should be reversed, so asserts defendant, because (1) the information charges no offense; the court (2) admitted improper evidence, (3) erred in its instructions to the jury, (4) should have required the State to elect upon which charge of alleged assault it would stand; and (5) that the evidence is wholly insufficient to sustain the verdict.

It is strongly urged and adroitly argued that the laws of this State do not make criminal the acts charged in the information, but we think otherwise and have heretofore so held. [State v. Wellman, 253 Mo. 302.] It would serve no useful purpose to go into the conflicting holdings of other jurisdictions as to whether the act here

Crime
Against
Nature.

charged was at common law included in the general terms "crime against nature;" because, even were the negative of this proposition conceded, it would avail defendant nothing in view of our amended statute. In the statutes of this State it is written: "Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, *with the sexual organ or with the mouth*, shall be punished," etc.; the words in italics having been added by amendment in 1911. [Laws 1911, p. 198.] The Legislature surely meant something by this amendment, and, if so, it evidently was to include certain acts against nature which the general common law terms did not embrace, and the acts it had in mind, it designated. The method denounced by the amendment, and employed in this case, is as much against nature, in the sense of being unnatural and against the order of nature, as sodomy, buggery, or any other unnatural copulation. The original statute gave no definition of the crime against nature, and it was unnecessary for the amendment, in order to embrace the act here charged, to more definitely define the act in contemplation than it did. As said in *Honselman v. People*, 168 Ill. 1. c. 174, "The statute gives no definition of the crime, which the law, with due regard to the sentiments of decent humanity, has always treated as one not fit to be named," and so with the amendment. Without lengthening the discussion of this loathsome subject, it is sufficient to say that the act here charged is within the statute, and that the information fully and sufficiently advised the defendant of the crime with which he was charged. [*State v. Wellman*, 253 Mo. 302; *Means v. State*, 125 Wis. 650; *Honselman v. People*, 168 Ill. 172; *Kelly v. People*, 192 Ill. 119.]

II. Defendant complains that, after the State had offered its evidence relative to the assault which

**Evidence
of Other
Kindred
Offenses.**

took place in Benton Park, it was not proper to prove the second assault committed at the brewery, and that, after the introduction of the evidence of both assaults, the State should have been required to elect as to the one upon which it would plant itself. The authorities all agree that, as a general rule, evidence of other crimes is inadmissible upon trial of the one charged, but to this there are exceptions, and among these is the one of a collateral crime which has a logical connection with the crime directly involved, or is so linked with it as to show that it is a part of the continuous accomplishment of a fixed and common design. In the cases of *State v. Schnettler*, 181 Mo. 173, and *State v. Spray*, 174 Mo. 569, the authorities upon this subject are ably and exhaustively reviewed, and from them it is readily deducible that where two or more offenses are connected under such circumstances as together constitute but a single and continuous accomplishment of a common design, evidence of all is admissible, notwithstanding that in each case the party could be separately indicted and convicted. In the case of *State v. Mathews*, 98 Mo. l. c. 128, the facts disclosed that after the perpetration of the homicide, and after the accused had left the scene some two hundred yards he shot at another person, and, in holding evidence of the second assault competent, the court said: "The evidence was admissible. The defendant and his companions were going directly from the scene of the homicide, just perpetrated. Greene was going toward it. The defendant's halting him was an act, the character of which not only illustrated the character of the principal act in the tragedy, as part of a system of criminal acts, but so intimately connected with it, as to make it a part of that very transaction, and to identify the defendant as an actor therein." To the same effect is *State v. McDonald*, 67 Mo. 13; *State v. Balch*,

State v. Katz.

136 Mo. l. c. 109; State v. Myers, 82 Mo. 558. This is in no degree in conflict with what is said in State v. Palmberg, 199 Mo. 233, and cases in line therewith. In those cases the proof of other and subsequent assaults was clearly inadmissible as having no logical connection with the crime under trial, and were not a part of a continuous and single accomplishment. The evidence in this case is sufficient to establish a conspiracy on the part of the defendant and his two companions (State v. Sykes, 191 Mo. 62), and clearly discloses that all that was done both at the park and the brewery was but parts of a fixed, single and common design. It was one continuous transaction, and from the moment that prosecutrix was seized by defendant and her companion taken away by his confederates the girl was within the power and control of defendant, and he was continuously using her in the accomplishment of a single design. These various acts were committed, one after the other, in almost immediate succession, and, no doubt, in pursuance of a common scheme and understanding on the part of defendant and his accomplices. It is our opinion that they were so closely connected and committed under such circumstances as to make evidence of the whole transaction competent, and that it was not error on the part of the court to overrule defendant's motion to require the State to elect.

III. What is said in the preceding paragraph disposes of defendant's objections to certain instructions which were given on the theory that the different acts testified to constituted but one continuous transaction.

Instruction numbered 1 defined the crime with which defendant was charged, and, among other things, told the jury that "it is immaterial whether the persons so used or abused consented thereto or not." We do not understand counsel to contend that the

Instruction:
Consent of
Prosecutrix.

consent of the person so used would constitute any defense, and, of course, it would not; but he insists that this portion of the instruction was unnecessary, and, as given, erroneous, because, if the other person consented, she was an accomplice, in which event corroboration of her testimony was necessary. This assignment is ruled adversely to defendant, because (first) there is not in all this record any evidence tending to establish that the prosecutrix consented thereto, and corroboration was, therefore, unnecessary, and an instruction requiring it would have been improper; and (second) the motion for a new trial contains no specific assignment on this subject. [State v. Conway, 241 Mo. 271; State v. Horton, 247 Mo. l. c. 663; State v. Wellman, 253 Mo. l. c. 316.] (Third) This instruction merely defined the offense for which defendant was on trial, and while perhaps it was unnecessary in this case to instruct the jury that consent was no defense, it cannot be said that the instruction was erroneous, or that it could have resulted in prejudice to the defendant.

IV. It is finally insisted that the evidence upon which this conviction rests is "so incredible, improbable and contradictory, and so opposed to all human experience" that the verdict should not be permitted to stand. As said by this court in State v. Sechrist, 226 Mo. l. c. 582, "That the transcript presents a state of degradation that challenges credulity must be conceded, and yet our statutes on incest and rape attest that these crimes are within the experience of our courts and legislatures." If the facts testified to by the prosecutrix are true, and in many respects she is corroborated by the testimony of disinterested persons, it cannot be said that the evidence is insufficient. The lawful triers of this issue have certified to us the truthfulness of her statements, and their verdict assessing punishment at

**Sufficiency
of Evidence.**

Deiner v. Sutermeister.

only two and one-half years' imprisonment, instead of showing passion and prejudice, evinces that mercy has tempered justice.

The judgment should be affirmed, and it is so ordered. *Faris, P. J., and Walker, J., concur.*

KARL DEINER v. CHARLES O. SUTERMEISTER
et al., Appellants.

Division Two, July 17, 1915.*

1. **PARTIES TO ACTION: Insanity After Suit Brought.** Even though the gist of the action is damages for insanity superinduced by negligent injuries, and the fact of insanity and the demand for damages therefor are brought into the case by an amended petition, plaintiff may maintain in his own name, without a guardian or next friend, a suit begun while he was sane.
2. **CONSTITUTIONALITY OF STATUTE: Not Timely Raised.** The Supreme Court on appeal will not consider the constitutionality of a statute upon which plaintiff has bottomed his case, where defendant did not raise the question of its invalidity until he had lost his case and came to file his motion for a new trial. Ordinarily a constitutional question must be lodged in a case as soon as is procedurally possible after the statute, order, judgment or thing alleged to be unconstitutional appears in the case.
3. **STRUCTURE: As Used in Statute: Does Not Include Hoist.** A hoist used in lifting stones to the top of a fire wall which is being constructed, is not either a structure or a scaffold within the meaning of those words as used in the statute (Sec. 7843, R. S. 1909) declaring that "all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles as may be used, placed or deposited thereon;" and a demurrer should be sustained to a civil action for damages bottomed upon a violation of said statute, brought by a workman, who, while riding on a hoist carrying a stone, was injured when it suddenly broke and fell to the ground.

*Note.—Opinion filed July 6, 1915. Motion for rehearing overruled July 17, 1915. Certified to Reporter March 11, 1916.

4. ———: *Ejusdem Generis As Scaffold*. The "structure" used in said statute is *ejusdem generis* as "scaffold," and both words are to be construed as meaning scaffolds, or contrivances and appliances of similar use and nature to scaffolds, such as platforms, staging, trestles of whatever kind, and ladders supporting planks.
5. **TESTIMONY: Expert: Insanity: Cause.** Where the issue is whether plaintiff's insanity was congenital or was caused by a fall of the stone-carrying hoist on which he was riding, it is error to permit a medical expert, who did not see the fall nor examine plaintiff for nearly a year afterwards, to testify that "a blow of that character could have caused insanity." He cannot substitute his conclusions for the conclusions to be found by the jury. He cannot say that a conceded condition is the result of the proven injury, where the producing cause thereof is the whole issue.

Appeal from Jackson Circuit Court.—*Hon. Joseph A. Guthrie*, Judge.

REVERSED AND REMANDED.

Pierre R. Porter and *Cyrus Crane* for appellants.

(1) The court erred in overruling defendants' demurrer to the evidence and in refusing the request for a peremptory instruction at the close of all the evidence. The plaintiff failed to prove a violation of the statute. (a) A "hoist" is not a "scaffold or structure" within the contemplation of the statute. (b) The statute cannot be invoked against a master who did not construct or own or operate or control the hoist. *Klebe v. Distillery*, 207 Mo. 480. (c) A plaintiff who pleads specific negligence must prove it, and cannot rely on *res ipsa loquitur*. *Cooper v. Realty Co.*, 224 Mo. 724; *Gardener v. St. Ry. Co.*, 223 Mo. 419; *Kirkpatrick v. Met. St. Ry. Co.*, 211 Mo. 85; *Beave v. Transit Co.*, 212 Mo. 352; *Feary v. Met. St. Ry. Co.*, 162 Mo. 96; *Ely v. Railroad*, 77 Mo. 36. (d) *Res ipsa loquitur* will not lie where it is as probable that the accident was due to a cause for which the master was not liable as to a cause for which he was liable. *Cothron v. Packing Co.*, 98 Mo. App. 343; *McGrath v. Transit Co.*, 197 Mo. 104; *State ex rel. v. Shelton*, 249 Mo.

697; Moriarty v. Co., 132 Mo. App. 653; Scott v. Nauss Co., 126 N. Y. Supp. 17. (d-1) The evidence failed to disclose whether the cause of the accident was due to negligent construction or operation, and for the latter Flanagan Brothers would be wholly responsible. (d-2) If the fall was due to negligent operation there would be no violation of the statute. (e) The section of the act under which this case was submitted to the jury is unconstitutional. Williams v. Railroad, 223 Mo. 666. (2) The court committed prejudicial error in permitting plaintiff's physician, Dr. Murphy, to state a conclusion which invaded the province of the jury. Taylor v. Railroad, 185 Mo. 257; Roscoe v. Railroad, 202 Mo. 594. (3) There is a defect of parties plaintiff. The court should not have permitted plaintiff to maintain the suit in his own name after the discovery of his insanity. A guardian should have been appointed by the probate court. 22 Cyc. 1222.

Ernest A. Scholer and Gage, Ladd & Small for respondent.

(1) The statute is a general law, and it was not necessary to specially mention it in the petition. It is sufficient if the facts alleged in the petition bring it within the statute, and we submit that they do. Lore v. Am. Mfg. Co., 160 Mo. 621; Strode v. Box Co., 250 Mo. 705; Lohmeyer v. Cordage Co., 214 Mo. 685. (2) This statute is highly remedial and is to be liberally construed. Koeppe v. National Co., 151 Wis. 302; Kosidowski v. Milwaukee, 152 Wis. 233; Bohnhoff v. Fisher, 210 N. Y. 172; Johnson v. Railroad, 196 U. S. 17; Simpson v. Iron Works Co., 249 Mo. 376; Turner v. Land & Timber Co., 259 Mo. 15; Lore v. Am. Mfg. Co., 160 Mo. 608. (3) The rule of *ejusdem generis* does not apply, and the word "structure" must be construed as if it stood independently of the word "scaffold." Caddy v. Interborough R. T. Co., 195 N. Y. 415, 30 L. R. A. (N. S.) 30; Kosidowski v. Milwaukee,

152 Wis. 223; Koepp v. National Co., 151 Wis. 302. (4) The framework which supported the hoist, and even the hoist itself, were a structure within the meaning of this remedial statute. The board which broke and let the hoist fall was the top board of this framework on which rested the headpiece which supported the pulley, through which the hoist was operated. It was the breaking and falling of this board (which was part of this structure) which caused the injury to the plaintiff. (a) "Any artificial creation is a structure." Kosidowski v. Milwaukee, 152 Wis. 223. (b) "Any production or piece of work artificially put together in some definite manner is a structure." Fuvro v. State, 46 S. W. Tex. 932. (5) The duty of the master, created by the statute, is absolute and he is required to insure the safety of the structure used in the erection of a building against falling. The fact that the timber broke and fell shows that the structure was unsafe and insecure and the statute was violated. Stewart v. Ferguson, 164 N. Y. 553; Caddy v. Interborough R. T. Co., 195 N. Y. 415; Gombert v. McKay, 201 N. Y. 27; Smith v. Iron & Steel Co., 130 N. Y. Supp. 277; Bohnhoff v. Fisher, 210 N. Y. 172; Koepp v. National Co., 151 Wis. 302; Kosidowski v. Milwaukee, 152 Wis. 223; Railroad v. Enderle, 170 S. W. Tex. 276; Railway v. Kurtz, 147 S. W. 658; Delk v. Railroad, 220 U. S. 580; Railroad v. United States, 220 U. S. 559; Railroad v. Taylor, 210 U. S. 281. The duties of master are absolute and violation of this statute constitutes negligence *per se*. Simpson v. Iron Works, 249 Mo. 376. (6) The many authorities cited by the appellant, to the effect that the doctrine of *res ipsa loquitur* does not apply in this case, are not in point. (7) Our statute prohibits the use of any such unsafe or insecure structure, whether it was constructed or owned by the defendants, or hired, or borrowed, or procured by them in any other manner from

others. Having hired the hoist from Flanagan Bros. and having hired Flanagan Bros.' engineer to operate it, they were, in all respects, as fully responsible as if they had constructed, owned and operated it themselves. This has been expressly decided. *Bohnhoff v. Fisher*, 210 N. Y. 172; *Campbell v. McNulty*, 148 N. Y. Supp. 73. (8) There was no error in admitting medical testimony for the plaintiff. The testimony objected to was at most but cumulative. *Taylor v. Met. St. Ry. Co.*, 256 Mo. 210; *Bragg v. Met. St. Ry. Co.*, 192 Mo. 334. (9) There is no defect of parties plaintiff. The plaintiff had a right to continue the suit in his own name, although he was insane. The suit was started while the plaintiff was sane, and he had never been adjudged insane. *Allen v. Ranson*, 44 Mo. 263; *Koenig v. Depot Co.*, 194 Mo. 571.

FARIS, P. J.—Plaintiff sued defendants in the Jackson Circuit Court for personal injuries alleged to have been sustained by him while in defendants' employment and recovered judgment for \$10,000. Defendants, after the usual motions, have appealed.

Defendants are partners engaged in business under the firm name of A. Sutermeister Stone Company, and were engaged at the time of the happening of the casualty on which this action is bottomed, in furnishing and putting in place the cut stone on a building in Kansas City, which was being constructed by Flanagan Brothers. Plaintiff, a young man about twenty-four years old, was in the employ of defendants as a common laborer, and at the immediate moment of the casualty was engaged in raising stone coping to the roof of said building by means of a hoist and in setting this stone in place upon the fire walls of the building. Two other men were employed in this work with plaintiff, namely, one Fischer, who seems to have been in charge of the work for defendants, and a negro by the name of Giles. The hoist which was

being used belonged to Flanagan Brothers, who had leased it temporarily to defendants, to be used by the latter in lifting the stone from the ground to the roof of said building. For the use of this hoist and the engine which operated it, and for the services of the engineer who ran the engine, defendants paid Flanagan Brothers one dollar per hour. This hoist consisted, it seems, of two rectangular shaped wooden platforms which ran up and down in a wooden framework and were raised and lowered by cables which ran over pulleys, which pulleys were operated by a steam engine, called in the vernacular of the trade a "hoisting engine."

After the work of hoisting this stone had proceeded for some several hours it became necessary to lift to the roof by means of this hoist an irregularly shaped stone, slightly shorter than the others and not long enough to lean against the cage so as to prevent it from falling. Thereupon Fischer, who as stated, was in charge of this work, asked in the presence of Giles and plaintiff, "Wouldn't it be wise for one of you fellows to go along with this stone?" At once, before Giles replied, plaintiff, without responding to the question except by his action, stepped upon the platform of the hoist and immediately thereafter the engine began to lift the hoist with plaintiff thereon. While the hoist was in motion and some considerable distance up, it suddenly broke and fell to the ground, carrying plaintiff with it. By this fall plaintiff received a severe laceration of the scalp and other injuries to his head, which some of the medical witnesses in the case diagnose as a fracture of the skull. He was taken up unconscious and removed to the emergency hospital, whence after temporary treatment he was sent to the city hospital, where he remained for a period of nine weeks, and was discharged, apparently cured. After his discharge from

the hospital he obtained light employment in one of the packing houses for some months, when he suddenly developed insanity, which necessitated his confinement in a sanitarium, where he yet was when the trial was had.

At a time left dark in the record, but as is conceded before plaintiff became insane, he filed this suit for damages against defendants. Subsequently, and after the suit had been pending for some time, an amended petition was filed herein, wherein plaintiff's insanity was set forth as one of the results of the injuries which he had suffered and for which damages were asked. In brief, this amended petition alleged that defendants had borrowed or rented the hoist from Flanagan Brothers and that one, said Fischer, defendants' foreman, had directed plaintiff to go upon the platform of the hoist and steady and support the stone which was being lifted by it, and that as said hoist was being lifted the timbers which supported it broke and the hoist and platform fell and hurt plaintiff. The specific negligence complained of in the petition was (a) an allegation of common-law negligence, for that defendants negligently required plaintiff to go upon a hoist which they knew, or which they might have known by the exercise of ordinary care, was defective in that the timbers therein were old and rotten and knotty and of insufficient size and not strong enough to sustain both the stone and plaintiff; (b) that the hoist which broke was a *structure* within the purview of section 7843, Revised Statutes 1909, and that it was not secured as said section *supra*, requires, so as to insure plaintiff against the falling thereof; and (c) that an ordinance of Kansas City requires elevators to be inspected and approved by the city elevator inspector and that this ordinance had been violated, in that no inspection of the hoist had ever been made.

Defendants moved to strike from the petition the allegations of statutory negligence and of violation of the ordinance, which motion was by the court overruled. Defendants thereupon filed an answer which consisted of (1) a general denial; (2) a plea of contributory negligence; (3) a plea that the injury alleged was caused by a fellow-servant, and (4) the defense of assumption of risk.

Upon the trial plaintiff abandoned his allegations of common-law negligence and violation of the ordinance, and elected to go to the jury solely upon the alleged violation of the statute *supra*.

The chief, if not the only controversy of fact in the case, was as to the cause of the insanity, from which appellants admit in their brief plaintiff was suffering. Much expert testimony was offered *pro* and *con*. It was strenuously contended by plaintiff's counsel that his insanity was due to a depression whereby the bony parts of the skull pressed upon the brain, which depression, it was claimed, was superinduced by the fracture of plaintiff's skull in his fall with the hoist. Toward the question of whether this depression, and therefore the insanity of plaintiff, was congenital or inflicted by the fall he concededly sustained, most of the testimony in the case was directed.

At the close both of plaintiff's case and of all the testimony in the case defendants offered demurrers to the evidence which were by the court overruled.

If other facts shall be necessary we shall add them in the opinion when we come to discuss the points mooted.

I. Passing over for the present the alleged unconstitutionality of section 7843, Revised Statutes 1909, for that it was not timely raised, we find three alleged errors lodged in the case:

Insane Plaintiff. (a) that plaintiff may not maintain a suit

in his own name without a guardian or next friend, though begun while he was sane, when the gist of the case is damages for insanity superinduced by the negligent infliction of the hurt alleged; (b) that the facts here do not bring the case within the purview of section 7843 supra; and (c) that it was error to allow the medical experts to express an opinion as to the causal connection between the injury and the insanity of plaintiff.

It is fundamental that an insane person under guardianship cannot sue (i. e., begin a suit) in his own name. Neither we opine should an insane person be allowed to bring an action, though not under guardianship, when as here, the very gravamen of the case is the assessment of damages for a condition of insanity which plaintiff not only concedes, but urges. In such case a demurrer would lie, we think. But these suggested conditions do not cover this case. Here the plaintiff is not under guardianship. When he brought this suit he was not insane. Pending the suit he became insane, and thereupon by an amended petition he set up in augmentation of damages the fact of insanity. When the suit was filed he was *sui juris*. This question has been ruled adversely to the contentions of defendant. [Allen v. Ranson, 44 Mo. 263; Koenig v. Union Depot Ry. Co., 194 Mo. l. c. 571.] It is true, as defendant urges, that in both the cases supra the fact of insanity was not the gist of the case, but merely incidental. In short, here the suit is for damages for injuries negligently inflicted, which it is alleged, brought about the insanity of plaintiff. But why should there be a distinction made? The guardianship of plaintiff would affect but two aspects of the case: (1) Matter of costs which is already covered and provided for by the order of the court permitting plaintiff to sue herein as a poor person, and (2) the disposal of the proceeds of the litigation, should there

be any, in such wise as to protect both the insane plaintiff and the defendants. These conditions and none others are to be met here, and they were likewise present and confronting this court in the two cases cited supra. So, since the conditions which might vex are the same precisely, the applicatory principles should be similar and no reason can be observed for changing the ruling. We follow *Koenig v. Union Depot Ry. Co.*, supra, and disallow this contention.

II. As above forecasted, we do not consider the suggested constitutional invalidity of section 7843, Revised Statutes 1909, formerly section 19 of "an Act relating to manufacturing, mechanical, mercantile and other establishments and places, and the employment, safety, health and work hours of employees" (Laws 1891, pp. 159 et seq.), for the reason that such unconstitutionality was not raised by defendants anywhere in the case until they had lost it, and came to file their motion for a new trial herein. No reason is urged, or known to exist, why such allegation was not lodged in the answer of defendants. They recognized that this statute was being invoked by plaintiff, because, more than a year before the trial, they filed a motion to strike from plaintiff's petition the parts thereof which were bottomed upon this statute. Our practice is settled that ordinarily a constitutional question must be lodged in a case as soon as is procedurally possible after the statute, order, judgment, matter or thing alleged to be unconstitutional appears in the case. [*Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 1. c. 387; *Lohmeyer v. Cordage Co.*, 214 Mo. 685; *Miller v. Connor*, 250 Mo. 677.] A party may not wait till he has lost the case and then in contravention of a statute and the Constitution itself and to the cluttering up and confusion of the courts, pick and choose his appellate forum by a be-

Unconstitutionality
of Statute
Untimely Raised.

lated constitutional question dragged by its very heels into the case.

III. It is strenuously urged by defendants that section 7843 does not apply to the facts in this case so as to allow a recovery thereon. Plaintiff contends that he sued both under the statute and at common law. He did, and we might add, that he also sued under an ordinance of Kansas City. But he put in no evidence of this ordinance, so it falls out of the case. He did not go to the jury upon common-law negligence, so for the present discussion it falls out of the case. He relied upon section 7843 and elected tacitly at least to go to the jury thereon, since he offered no instructions and put in no evidence of common-law negligence unless (and upon the facts here and the view we take of the case we do not need to discuss this phase) the rule of *res ipsa loquitur* applies and bridges the break in the case made by lack of evidence of any specific omission of duty on defendants' part.

Section 7843, the applicability of which is so seriously questioned, is as follows:

"All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or near by."

It is apparent if not conceded that the thing which broke and fell here was a hoist, which is defined to be

an "apparatus for lifting goods" (Webster's Dictionary), and that it was not a scaffold. Plaintiff seemingly concedes that it is not a scaffold, but while so conceding contends that it is a "*structure*," and such a one as is embraced within the language of the above section. Defendants just as earnestly contend that the mechanism which broke and fell and hurt plaintiff is not within the intendment of the above statute. The frank concession of plaintiff's counsel and our own views, based on the respective definitions of these two words, considered (Webster's Dictionary; 35 Cyc. 797), we think we may safely eliminate any question of whether a hoist or "an apparatus for lifting goods" is a scaffold within the contemplation of said section 7843. [5 Labatt, Master & Servant, sec. 1843.] But is it a "*structure*" within the meaning of this section? If it is, other things being equal, we ought to affirm the case.

Our Missouri act passed in 1891 was almost the pioneer essay into this field of so-called safety-of-labor-legislation. It is apparent that our Legislature had in mind such structures as those upon which men stood and worked—the context, we think, shows this. Later statutes passed by other States, for the most part specifically mention *hoists*. [Cf. Wisconsin, Laws 1901, chap. 257; Illinois, Laws 1907, p. 312; Indiana, Laws 1903, p. 151; Kansas, sec. 4684, R. S. 1909; Nebraska, Comp. Stat. 1911, sec. 37930; New York, Laws 1911, chap. 693; Ohio Gen. Code, sec. 12593; Oklahoma, Laws 1907-8, p. 519.] The fact that the legislatures of the above States and others, saw fit specifically to write into their statutes the word *hoists*, is at least persuasive toward the view that there existed likewise in the legislative mind the thought that the designation "scaffold or structure" did not include hoists, lifts and elevators. The language of the New York statute is a fair type of all

the others mentioned. The language used in the New York statute is, so far as here pertinent, as follows:

"A person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoist, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

Much difficulty seems to have been encountered in determining what is a "structure" within the purview of that part of the New York statute which applies the provisions thereof to buildings and *structures*, but obviously no difficulties have arisen therein touching any distinction as between a *scaffold* and a *hoist*. In this sense in New York and elsewhere the word structure has been broadly construed, so that a "waterworks system" (*Kosidowski v. Milwaukee*, 152 Wis. 223); "a street railroad car" (*Caddy v. Interborough R. T. Co.*, 195 N. Y. 415); a "canal" (*Pacific Rolling Mill Co. v. Bear Valley Co.*, 120 Cal. 94); a "fence" (*Karasek v. Peier*, 22 Wash. 419); a "mine" (*Helm v. Chapman*, 66 Cal. 291); a "ship" (*Chaffee v. Union Dry Dock Co.*, 73 N. Y. Supp. 908); a "telephone line" (*Forbes v. Electric Co.*, 19 Ore. 61); a "railway" (*Powder Co. v. Railroad*, 42 Fed. 470); an "aqueduct" (*Nash v. Commonwealth*, 174 Mass. 335); a "bay-window" (*State v. Kean*, 69 N. H. 122); and many other artificially constructed contrivances have respectively been adjudged to be "structures" to which the duty of providing safe "scaffolds, hoists," etc., applied under these statutes.

We have been cited to no case and our own researches have found for us none, wherein a structure

has been ruled to include a hoist. It is plain that it does include by the use of the words "scaffolds or structures" all stationary platforms, staging, trestles and other similar false work used in erecting, or in tearing down, buildings of any kind, in addition to the contrivance connoted by the use of the general word *scaffold*. [Convey v. Finn, 114 N. Y. Supp. 864; Nixon v. Thompson-Starrett Co., 115 N. Y. Supp. 130; Chaffee v. Union Dry Dock Co., 73 N. Y. Supp. 908; Swenson v. Mfg. Co., 186 N. Y. 555; McLaughlin v. Eidlitz, 64 N. Y. Supp. 193; Anderson v. Milliken Bros., 194 N. Y. 521; Madden v. Hughes, 185 N. Y. 466; 5 Labatt, Master & Servant, p. 5866.]

Moreover, as stated above, we think it is obvious from the very context of said section 7843 that in the clause "scaffolds or structures," the last word is *ejusdem generis*, and said clause is to be construed as meaning scaffolds, or contrivances and appliances of similar use and nature to scaffolds, viz., platforms, staging, trestles of whatever kind and ladders supporting planks. [See cases supra.] This view by the very clearest analogous reasoning was taken in the St. Louis Court of Appeals in the case of Loehring v. Construction Co., 118 Mo. App. 163. This was a case wherein (to quote the language of the opinion itself) "the appellant stepped on a board or plank twelve inches wide and two inches thick, laid on the topmost end of four-by-four-inch supports, standing perpendicular, the bottoms of which rested upon 'out-riggers' projecting from the building. This plate on top of the four-by-four-inch uprights, was wedged between the top of the uprights and the under surface of the floor girders of the fifth floor, was adjacent to the partition framework of said fifth floor, and furnished a convenient place for workmen to step upon when moving about in proximity thereto. He had gone to the fifth story in the performance of a task and had

occasion to pass from one part of that story to another. The floor was not laid and he had the choice of walking on an iron beam three inches wide, five stories above the ground, or on a board twelve inches wide. He chose the latter. It slipped from its position and he was injured."

Upon this state of facts the learned judge who wrote the opinion, after quoting said section 7843 supra, nevertheless at page 182 of his opinion said:

"It will be noted that the requirements of said section in so far as material here, are: 'Scaffolds . . . used in the erection . . . of any building, shall be . . . safely supported and of sufficient width, and so secured as to insure the safety of persons walking thereon or passing under or about the same against the falling thereof.' The statute means what it says. Its purpose is to secure the safety of 'persons walking thereon' or 'passing under or about the same against the falling thereof.' It is sufficient to say that the appellant was not 'walking thereon,' nor was he 'passing under or about the same' within the meaning of the statute. The scaffold was on the outside of the building and for him to have been 'walking thereon' within the meaning of the statute, he should have been on the scaffold, not on a mere contrivance serving as a support, in no sense intended to be walked upon, and to bring himself within the pale of its provisions, and recover for injuries received while 'passing under or about the same' on the theory of negligence *per se*, he should show that he was 'passing under or about the same' and was injured by reason of causes other than his own fault in subjecting such portion of it to an improper use and for which use it was not intended. He was inside the building, walking on a contrivance as much as twelve feet from the scaffold, which contrivance was parcel of its support and was constructed not as a scaffold,

as plaintiff well knew, but for no other purpose than as a support thereto. It would be preposterous to say that by this enactment pertaining to the sufficiency of the scaffold as a scaffold, that the Legislature intended that every part and parcel of it, far removed from the contemplated structure, should be made so secure as to sustain a man's weight when using it for a purpose wholly foreign to its erection."

It fairly follows we think that a hoist is neither a scaffold nor a structure within the meaning of section 7843, and under the facts here. If this is not true, then the broad construction which plaintiff's learned counsel contend should be put upon the word "structures," as it is used in said section 7843, would require the roof, walls, partitions, window-frames and door jambs and every other component part of a building under construction, destruction or repair, wherever such part is composed of as many as two bricks, two stones, or two planks "artificially put together in some definite manner" (*Favro v. State*, 46 S. W. 932), to be "so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles [e. g., bricks, planks, spikes, bolts and tools] as may be used, placed or deposited thereon." In short, so broad a construction would serve to make this section applicable to practically every conceivable or possible casualty, which could occur in any building or re-building operation of whatever sort.

Conceding that it has been said touching some of the provisions of this same act, that such laws are highly remedial (*Simpson v. Witte Iron Works Co.*, 249 Mo. 376), yet we are not permitted to legislate judicially. To hold that a hoist is a structure would be to trespass upon the function of the lawmakers. If there is any liability in the case it must arise from the violation of what is commonly called a common-law

duty, and be bottomed upon a negligent performance of that duty. Therefore the demurrer to the evidence ought to have been sustained, upon the case made, bottomed upon the statute.

IV. As the case for the error noted must be reversed, we take occasion to discuss briefly whether it was error to permit the expert medical witness, Dr. Murphy, to testify that "a blow of that character could have caused insanity." The witness never saw the wound and did not see or examine the plaintiff till long subsequent to the happening of the injury to his head. He was testifying upon the basis of an examination made nearly a year later and upon a hypothetical question. The issue for the jury was not the insanity of plaintiff, for that we understand both sides to concede; nor was it the depression in his head, for there is no serious dispute as to the existence of that depression; but the issue was whether the depression, which the experts had the right to say might bring about insanity, was congenital, or whether it was caused by the injury. This was the chief *bone of contention* and the main issue for the jury. Let us look to the analytical sources of the rule to see if this was error.

This phase of the case presents no peculiar or mountainous difficulty. The general rule is that a medical expert will not be allowed to invade the province of the jury and substitute his reasoning and conclusions for the reasoning and conclusions of the jury upon the issue or issues before the triers of fact. [Castanie v. Railroad, 249 Mo. 192; DeMaet v. Storage Co., 231 Mo. 615; Glasgow v. Railroad, 191 Mo. 347; Roscoe v. Railroad, 202 Mo. 576.] For example, the medical expert in a will case may tell the jury whether certain symptoms betoken insanity, but he may not tell the jury whether a person having such

symptoms and *ergo* presumably having such insanity is or is not too insane to be capable of making a will; for in such case the issue is: Did the testator have *sufficient mental capacity to make a will?* Neither will a medical expert in a criminal prosecution be allowed to state whether the subject of the inquiry had mental capacity sufficient to know right from wrong, or to form a specific criminal intent to an extent rendering him amenable for his crimes. He may tell the jury his opinion of whether a scar upon flesh or bone is congenital or inflicted, but clearly he may not tell the jury from a hypothetical question long after the healing of the wound, which he never saw, what specific hurt caused the scar *when that is the issue*. In short, he may not say whether a conceded condition is the result of the injury proven, where the producing cause thereof is alone in issue. He undoubtedly may say, however, that a given cause might bring about a given effect, but not that it will do so, or that in a given case then at issue before the triers of fact, it did bring it about. So, the witness could say whether in his opinion the depression was congenital or inflicted; so also whether if inflicted by a fall or a blow it was possible for it to cause insanity. He could not say that insanity inevitably would follow or that it did follow the very blow in issue, or that the identical fall or blow sharply in issue caused it. This rule is true generally, we think. If it is not, then the facts which to an extent make this case *sui generis*, make it true here.

It results that this case must be reversed and remanded to be retried, if plaintiff is so advised, in conformity with the views expressed herein. Let this be done. All concur.

CITY OF ST. LOUIS, Plaintiff in Error, v. NICHOLAS NASH.

Division Two, January 6, 1916.

1. **FIRE LIMITS: Definition of Structures.** Within properly defined limits a municipal legislative body may define the objects designed to be affected by its fire-limit ordinances and a court in construing such ordinances is ordinarily bound to follow the city's definitions of buildings and other structures so affected.
2. **———: Tent: Lacking Portability: Building.** A structure lacking the element of portability, and being canvas stretched and held in place by a wire cable attached to two large telegraph poles set firmly in the ground and by guy cables run laterally from this main cable to other posts also set firmly in the ground, with a stage, dressing rooms, ticket office and benches built of wood, the whole used as a moving-picture theatre, is not a tent, as that word is ordinarily understood; but under the ordinances of St. Louis declaring that the word "building" shall be taken to mean "any structure for the support, shelter or enclosure of persons, animals or chattels" is a building within the purpose and intent of the fire-limit restrictions.
3. **———: Reasonable Regulation.** And an ordinance which prevents the carrying on of a permanent business in such a building is a reasonable police regulation.

Error to St. Louis City Court of Criminal Correction.
—*Hon. Benjamin F. Clark*, Judge.

REVERSED AND REMANDED (*with directions*).

William E. Baird and *Truman P. Young* for plaintiff in error.

The structure erected by the defendant is a building within the definition of the Building Code of the city of St. Louis and within the general legal interpretation placed upon the word "building." Revised Code of St. Louis, sec. 336; *Blakemore v. Stanley*, 33 N. E. 689; *Nowell v. Boston Academy*, 130 Mass. 209;

Killman v. State, 28 Am. Rep. 432; Favre v. State, 73 Am. St. 953; Williams v. State, 70 Am. St. 82; Kansas v. Poole, 65 Kan. 713; People v. Steckman, 34 Cal. 242.

Taylor R. Young and *Edward W. Forristel* for defendant in error.

(1) Sections 341 and 505, R. O. City of St. Louis 1912, were never intended to prevent the erection and maintenance of a tent, such as the evidence in this case shows the defendant was erecting at the time he was charged with violating said sections. *Childress Seashore v. Atlantic City*, 59 L. R. A. (N. J.) 947; *Coddington v. Beebe*, 31 N. J. L. 477; *Allen v. Ayre*, 3 Dow & R. 96; *Trust Co. v. Cameron I. & C. Co.*, 47 Fed. 136; *Callahan v. State*, 41 Tex. 43; *State v. Barr*, 39 Conn. 44; *Rouse v. Catskill*, 13 N. Y. Supp. 123-127; *Tuesdell v. Gray*, 79 Mass. 311; *Hawaii v. Manchiki*, 190 U. S. 197; *Century Dictionary*, pp. 712, 6234; *Bouvier's Law Dictionary*, p. 268; 1 *Oxford's Dictionary*, p. 1162; *Anderson's Law Dictionary*, p. 139; 6 *Cyc.* 115 (2) Even though said sections were intended to apply, they are so unreasonable as to be void under the decisions of this court. *Kelley v. Meeks*, 87 Mo. 396; *Corrigan v. Gage*, 68 Mo. 541; *St. Louis v. Weber*, 44 Mo. 547; *Tarkio v. Cook*, 120 Mo. 1. (3) The Municipal Assembly of the city of St. Louis, has no power to prevent by ordinance the use of property so as to prevent a tent of the character in question here from being constructed upon and operated in connection with the use of such property. Clause 12, sec. 26, art. 3, Charter, City of St. Louis.

FARIS, P. J.—This is a case growing out of the prosecution of defendant in error for an alleged violation of an ordinance of the city of St. Louis. Being cast in the police court and likewise in the Court of Criminal Correction to which it appealed, the city

brings the case here by writ of error. Since, throughout, no change has occurred in the parties, we will for clarity's sake refer to them as the plaintiff and the defendant, respectively.

The section of the city ordinances which the complaint alleges that defendant violated, reads thus:

"Sec. 341. No fourth-class buildings shall hereafter be built within the district known as the fire limits, as hereafter defined, except such buildings as are provided for in sections 342 and 343 of this article." (Here follows a description of the fire limits.)

When the case reached the Court of Criminal Correction a motion to quash the complaint was filed by defendant, but action thereon was deferred by the learned judge *nisi* till he had heard the case on the merits. Thereupon the case was presented below upon agreed facts, which the court heard and thereafter entered an order quashing the complaint. Therefore, though we follow the language of the court *nisi* in stating that the motion to quash was sustained, it is plain that the case was actually heard and decided on the merits.

The agreed facts are lengthy; but since in the view we take of the controversy, alone, the method of the construction and physical nature of the structure erected and used by defendant is important, we will not burden the statement of the case with more of the facts than will but suffice to illuminate this single point. Specifically, defendant was prosecuted for erecting and using as a moving-picture theatre, a certain structure which plaintiff contends violated the provisions of the section of the city ordinances which we quote above. The erection and use of the structure within the fire-limits were admitted. It is therefore manifest that the whole case turns on the nature of the structure so erected by defendant. The agreed facts

thus describe the materials of which it was constructed, the manner of construction thereof and the purposes for which it was used, viz.:

“Said shelter or structure is ninety-seven feet in length and fifty-eight feet in width, and has a height along the center of thirty feet, and a height along the sides, between the ground and the eaves, of eight feet. It is supported by two telegraph poles fourteen inches in diameter firmly set in the ground, one at the front end, facing Jefferson Avenue, on the inside, about ten feet west of the entrance, and in the center thereof. The other on the outside and west of the west end thereof. Said telegraph poles are thirty-five feet high, and between them is stretched a wire cable an inch and a half or two inches in diameter. To said cable are attached ropes which extend down to the top of the canvas cover and support the same. Also at intervals of eight feet, ropes extend down from the center of the top of the cover of said shelter or structure to the sides and bottom thereof, and most of them are connected with wooden posts securely driven in the ground and which are located about ten feet outside of the canvas cover, which keeps the covering taut. There are thirty of said poles upon each side of said shelter or structure, one-half of which are eight feet in height and the remainder twelve feet in height. Said poles are about three and one-half inches in diameter, and in the center of the top thereof is an iron peg securely driven therein, about one-half inch in diameter and eight inches in length and which projects above the top of the said pole about five inches. The canvas covering is composed of 12-ounce Army Duck Canvas. At the front end of said shelter or structure two wire cables or guy cables extend from the top of the front telegraph pole, one to the northeast corner of the lot upon which said shelter stands, and the other to the southeast corner. Said cables are attached to

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posts firmly embedded in the ground fifteen feet outside of said shelter. At the rear end of said structure or shelter are three guy cables which extend from the top of the telegraph pole at the rear of said structure to posts firmly embedded in the ground, one of them at the northwest corner of the lot upon which said shelter or structure is located, another at the southwest corner and another at the west and near the center of the west end of said lot. The front and rear ends of said shelter or structure are supported by two poles, eighteen feet high, at each end thereof, which support the canvas cover at a point fifteen feet from the top of the cover on each side and at the end thereof. At the rear end of said shelter or structure is located a stage or platform, built of wood, upon each side of which are wings or dressing rooms composed partly of wood and partly of canvas. Inside of said structure or shelter are rows or tiers of seats in bench form. Between said rows of seats there is one aisle down the center six feet wide, and on each side of said shelter or structure there is also an aisle eight feet wide. There are sixty-four benches, each of which will seat ten people, so that said shelter or structure has a seating capacity of six hundred and forty persons. The said shelter or structure is equipped with electric lights set in iron conduit for lighting in the evening, and the stage or platform is also equipped with electric footlights set in conduit. Said shelter or structure is constructed in such a way that the sides can be raised up in the summer time and lowered in the winter time, and in the winter time the said sides are lowered, and at all places, except exits, when the sides are lowered, are banked along the outside with earth sufficient to shut out drafts. Said shelter or structure is equipped with four so-called cannon, or heavy cylindrical, stoves for heating, one stove being placed in each corner thereof, and the stovepipe goes out

through a hole in the side, which is fortified with asbestos and tin, and projects ten feet outside of the canvas cover. The floor of said structure or shelter is of earth and cinders, except that in front of each seat there is a board plank eight inches wide upon which the audience rest their feet. And in each aisle there is a board walk eight feet wide composed of one by two boards laid flat on the ground and nailed to cross pieces sunk in the ground. And between the ticket office and the east side of said shelter or structure are also similar boards laid in like manner. The seats are built of wood, in the form of benches. Along the street line or entrance to the lot upon which said shelter or structure stands is a series of door panels, composed of wood and glass, and consisting of eight such door panels. Six of said panels swing on hinges, and may be opened for the admission or exit of persons. Immediately inside of said outside entrance is an open space of ten feet where there exist two brick columns with wood jambs upon which two swinging doors are hung, composed of wood with glass windows, about seven feet in width and eight feet high. Between the two entrances there is a booth made of wood seven feet high and in the shape of a half moon, and is located outside of the shelter or structure. After passing through said inside entrance doors the audience are admitted into a small corridor or chamber, with a canvas cover, with canvas sides, which leads through a canvas curtain directly into the main auditorium. In the summer time these doors and the corridor are done away with, and the audience simply pass from the ticket office into the main auditorium. There they are seated for the purpose of witnessing exhibitions of moving pictures, etc. One exhibition is held every evening, and further, there is an exhibition every Sunday afternoon. Such, in general, is the description of the structure or shelter in question."

It is clear that if the erection and use of the structure above-described violate the provisions of section 341 of the ordinances, the court *nisi* erred; if it does not, he was right. Let us look to this point.

I. Confining the case to yet narrower limits, it is obvious that the question turns on whether the described structure is or is not a "building" within the purview of the section of the fire limits ordinance set forth, *supra*, and which plaintiff alleges defendant violated. If it is a building it is conceded to be such a one as is by the city ordinances designated, "of the fourth-class," the erection of which, at the place where defendant built and maintained the structure in controversy, is absolutely forbidden by said section 341. Plaintiff urges that the structure is a building; defendant just as strenuously contends that it is a tent. This, in a nutshell, is the concrete point confronting us.

The city ordinances define buildings of the several classes thus:

"'Building of the First Class' shall be taken to mean a building of fire-proof construction throughout, the structural parts of which are wholly of brick, stone, or tile, concrete, iron or steel, or other equally substantial and incombustible materials. 'Building of the Second Class' shall be taken to mean a building of mill or slow combustion construction, wherein all floors and roofs are constructed of heavy dressed timber, exposed beams, girders and planking and supported upon masonry walls, or on wooden or fire-proofed iron or steel columns. 'Building of the Third Class' shall be taken to mean any building not of the first or second class, the external and party or division walls of which are wholly of brick, stone or other equally substantial and incombustible materials. 'Building of the Fourth Class' shall be taken to mean

any building not of the first, second or third classes.” [Sec. 336, R. C. St. Louis.]

There is but little doubt we opine that within limits not necessary here to discuss (since obviously the boundaries are wide enough to include the facts here), a legislative body may define the objects affected or designed so to be by its own enactments, and that we are bound ordinarily in construing its acts or ordinances to follow its own definitions. [State ex rel. v. Allison, 155 Mo. 325.] Therefore we note that a “building” is thus defined by the ordinances of plaintiff city:

“‘Building’ shall be taken to mean any structure for the support, shelter, or enclosure of persons, animals or chattels; and when separated by division walls without openings, then each portion of such building shall be deemed a separate building.” [Sec. 336, R. C. St. Louis.]

So again narrowing the limits of the question and the scope of the instant inquiry, we need only to ascertain whether the structure in question was a building within the purview of the above definition.

Defendant strenuously insists that the structure in controversy is a tent, and that a tent is not a building. *Quod erat demonstrandum*. We may question this position from two angles: (a) Can it be maintained upon the facts, and (b) if it can be so maintained will the legislative definition nevertheless include it and make of it a building when, absent the definition, it was before but a tent?

The lexicons, under the statutory admonition that words found in statutes are to be regarded ordinarily as being used in their plain, usual and everyday meaning (Sec. 8057, R. S. 1909), define the word “tent” thus: “A pavilion, or portable lodge consisting of skins, canvas or some strong cloth stretched and sustained by poles, used for sheltering

persons from the weather, especially soldiers in camp." [Webster's Int. Dic.]

The above definition of the lexicographers is in line with that of the courts, as witness the Texas Court of Criminal Appeals which defines a tent thus: "A 'tent,' in the ordinary acceptation of the word, is a pavilion, portable lodge, or canvas house, inclosed with walls of cloth and covered with the same material." [Killman v. State, 2 Tex. App. 222.] Likewise pertinent to the question whether a tent is a house, and therefore a building, the curious may consult the cases of Nowell v. Boston Academy, 130 Mass. 209; Blakemore v. Stanley, 159 Mass. 6; Favro v. State, 73 Am. St. 950; Williams v. State, 70 Am. St. 82; State v. Poole, 65 Kan. 713; People v. Stickman, 34 Cal. 242.

Analyzing the facts of construction in the light of the definitions, *supra*, but leaving out of view the dimensions of this structure, which are ninety-seven by fifty-eight by thirty feet, we observe that it seems to lack portability, in that it is supported by telegraph poles fourteen inches in diameter "set firmly in the ground." These telegraph poles are bound together by a two-inch wire cable, which serves as, and in lieu of, a ridge-pole. From these telegraph poles other wire cables, five in all, called guy-cables, run down to an attachment to other posts "firmly embedded in the ground." Likewise a departure touching the sort of materials used in construction is noted. For at the rear of the structure there is "*a stage built of wood, upon each side of which are wings or dressing rooms composed partly of wood and partly of canvas.*" This stage and the whole structure for that matter, is equipped with electric lights, and at the front of the stage there are footlights set in a conduit. Practically the whole of the floor, in fact all space, except that on which the seats sit, is covered

with boards. Such floor is constructed for the most part of one by two boards laid flat and nailed to cross-pieces sunk in the ground. The front of the structure which abuts on the street, is made of eight door panels, which swing on hinges and which are made of wood and glass. Just inside of the outside entrance there are two brick columns with jambs of wood, to which are hung doors of wood and glass, seven feet wide and eight feet high. Between the row of eight wood panels and the row made up of the brick columns and swinging doors *there is a crescent shaped booth made of wood*, which apparently serves as a place for selling tickets. But this should suffice for an iteration of points of dissimilarity between this structure and a tent. The others may be picked out of the description which we print in our statement. It will be seen that the element of portability is sadly lacking, and that other materials, to-wit, wood and glass and brick, have been added to the skin and canvas-covering of the genus tent, connoted by the definitions of the cases and of the lexicographers. Clearly this structure cannot be made a tent merely by calling it a tent, even though touching a matter to an extent analogous, one Squeers of Dotheboys Hall sapiently observed that "there is no law to prevent a man from calling his house a hall if he wants to do so." [Nicholas Nickleby, reported by Charles Dickens.]

So, examined by the touchstone of similarity of earmarks, we must conclude that the structure in controversy is not a tent, as the latter *word is generally understood*. In passing we may say that the word "tent" as used in our statutes, numerouslly cited to us by defendant, means "tent" as the word is ordinarily understood, and therefore the language of those statutes is in no way pertinent to contradict what we say above.

II. We turn to the definition then to determine if we can, whether within the purview of the ordinances of the plaintiff city, it is a building.

A Building. We need consider only the first part of the definition, to-wit: "'Building' shall be taken to mean any structure for the support, shelter, or enclosure of persons, animals, or chattels," and leave off the last, to-wit: "and when separated by division walls without openings, then each portion of such building shall be deemed a separate building;" for obviously if we conclude that it is a building we are not called on to proceed further and rule that it is two buildings, even though the facts that there is a wooden stage at one end and a wood and glass ticket office and entrance at the other, seem pertinent to this view.

Looking at the legislative definition and measuring the structure here thereby, there is no escape from the conclusion that it is a building *within the purpose and intent of the fire-limits ordinance*, and so we rule.

III. Neither do we think that the ordinance is void for that it is unreasonable. Defendant urges

Reasonable Fire Limitation. this, saying, if we understand his contentions, which are somewhat vague,

that should we hold that the ordinance includes a structure of the sort here in question, then such a construction renders the ordinance void because it is unreasonable and unduly burdensome. Such ordinances are referable to the police power, through an invocation of which alone are they sustainable. We are not advised wherein the alleged unreasonableness lies; neither do the cases cited by defendant throw any light upon the point. Speaking generally we may say that if such structures as that here under discussion are not to be regulated and their erection either forbidden, or at least controlled, by ordinance, there seems to be nothing in this case at least which would prevent the construction of inflammable and

unsightly conglomerate sheds of the same sort anywhere and everywhere in the city, and the carrying on therein of permanent businesses of whatever sort indefinitely. Such a condition is unthinkable. We need not take up space considering this phase of the case, but disallow it out of hand.

Let the case be reversed and remanded, with directions to the court *nisi* to overrule the motion to quash the complaint and to retry the case in such wise as is not inconsistent with the views herein expressed. All concur.

WILLIAM A. BRANDENBURGER, Appellant, v.
MATHILDA A. PULLER et al.

Division Two, January 6, 1916.

1. **PUBLIC POLICY: Settlement of Litigation.** Absent fraud in its various forms, or unlawful or insufficient consideration, settlements tending to avoid litigation and family discord are not contrary to public policy, whether made by all or only a part of those concerned.
2. ———: ———: **Consideration.** An agreement of a person legally in a position to contest a will, to refrain from opposing its establishment, in consideration that a definite sum of money be paid to him by the residuary legatee, is supported by mutual considerations.
3. ———: ———: **Will Contest.** Testatrix gave the great bulk of her property to a residuary legatee who was not an heir at law. Five legatees who were heirs and one heir who was not a legatee, together with the marital consorts of two of them, instituted a will contest in the circuit court against said residuary legatee, her husband and thirty-two other persons. Before the action had been tried the eight plaintiffs, and six defendants, some of whom were heirs at law but not legatees, as parties of the first part, entered into an agreement with the said residuary legatee and her husband by which said first parties affirmed said will as the last and lawful will of

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the testatrix and agreed that it might be taken and proven as such without further objection, and that upon the payment to them of \$9,500, their interest in said estate, whether as heirs or legatees, should vest in said residuary legatee. Of this amount \$1500 was to be applied to the payment of attorney's fees and costs which had accrued in the suit, and the balance was to go in equal shares of \$1000 each to the eight persons directly interested. Thereafter the parties of the first part appeared in open court, announced their desire to discontinue the action, and fully informed the court of the terms and purpose of the compromise agreement. Thereupon, another defendant, who was an heir and legatee, but not a party to the compromise agreement, was permitted, by order of court, to plead as a party plaintiff, and to continue the prosecution of the action, which she did as sole plaintiff, and the trial resulted in a judgment sustaining the will. *Held*, that the compromise agreement was not contrary to public policy, was supported by a valid consideration, was free from fraud, and is binding on the residuary legatee.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

REVERSED AND REMANDED.

Wagner & Miller and *Henry S. Caulfield* for appellant.

(1) The agreement is based upon a valid consideration sufficient to support the promises of the defendants. *Grochowski v. Grochowski*, 15 Am. & Eng. Ann. Cas. 300, 13 L. R. A. (N. S.) 454 and case note; *Waller's Admx. v. Marks*, 100 Ky. 541; *Ruth v. Krone*, 10 Cal. App. 770; *Palmer v. North*, 35 Barb. 282; *Hartle v. Stahl*, 27 Md. 157; *St. Marks Church v. Teed*, 120 N. Y. 585; *Clark v. Lyons*, 38 Misc. (N. Y.) 516; *Gaither v. Bland*, 7 Ky. L. R. 518. (2) Such agreements are not opposed to public policy. On the contrary, public policy favors them because they preserve the harmony of the family and prevent disputes and litigation. It concerns the State that an end should be put to litigation. Cases *supra* and *Andrews v. Linebaugh*, 260 Mo. 650; *Moss v. Cohen*, 158 N. Y.

240; Barrett v. Carden, 65 Vt. 430; Schoonmaker v. Gray, 208 N. Y. 209; Leach v. Fobes, 11 Gray, 506; Stringfellow v. Early, 15 Tex. Civ. App. 597; Baughey v. Minor, 1 Prob. L. R. 181 (Eng.); Page on Contracts, sec. 341. (3) It is immaterial that all the defendants to the will contest suit were not parties to the agreement. Moss v. Cohen, 158 N. Y. 240; Hambleton v. Yocum, 108 Pa. St. 304; Schoonmaker v. Gray, 208 N. Y. 209; Ruth v. Krone, 10 Cal. App. 770; Todd v. Todd, 159 Ill. 408; Waller's Admx. v. Marks, 100 Ky. 541; Hogan v. Hinchey, 195 Mo. 527; Andrew v. Linebaugh, 260 Mo. 650; Gay v. Sanders, 101 Ga. 601. (4) Courts will not declare contracts void on grounds of public policy except in cases free from doubt, and prejudice to the public interest must clearly appear before a court is justified in pronouncing an agreement void on this account. Barret v. Carden, 65 Vt. 430; Richmond v. Railroad Co., 26 Iowa, 191; Melloyne v. Larkin, 3 Penn. 123, 56 Am. Dec. 164; Richardson v. Mellich, 2 Bing. 229, 9 Eng. Com. L. 557.

Schnurmacher & Rassieur for respondents.

Although family settlements, joined in by all parties in interest, are favored by the law, because tending to avoid litigation, yet an agreement by only a part of those concerned, not to press a will contest, is against public policy, because it has a tendency to interfere with the ordinary course of justice, and will not be upheld. Ridenbaugh v. Young, 145 Mo. 274; Porter v. Jones, 52 Mo. 399; Gray v. McReynolds, 65 Iowa, 461; Cochran v. Zachery, 137 Iowa, 785; 15 Am. & Eng. Ency. Law (2 Ed.), p. 977.

REVELLE, J.—A general demurrer to plaintiff's second amended petition having been sustained, plaintiff declined to plead further and final judgment was thereupon entered for defendants.

The petition alleges, in substance, the following:

Mathilda A. Lague died leaving a will, which was admitted to probate in the probate court of the city of St. Louis on October 16, 1909. Numerous legatees and their legacies were designated in the will, and the residue, being the major portion of the estate, was given to the defendant Mathilda A. Puller. Her husband and co-defendant, Edward S. Puller, was appointed one of the executors. By the 12th clause of the will it was expressly provided that the legacy of any person contesting the will should be revoked.

On December 2, 1909, a suit, contesting the will, was instituted in the circuit court of the city of St. Louis by eight plaintiffs, five of whom were grand-nieces, legatees and heirs at law of the testatrix, and one of whom was a grand-nephew and heir at law, but not a legatee; and two of whom were a wife and husband, respectively, of two of the other plaintiffs. There were thirty-four defendants, of whom two were executors; four were heirs at law, but not legatees; fourteen were legatees, as well as heirs; three, including the defendant Mathilda A. Puller, were legatees, but not heirs at law; and eleven were joined merely as husbands or wives of heirs at law who were parties defendant.

On March 9, 1910, and before the cause had been tried, an agreement in writing was entered into making a compromise and settlement between certain parties upon an agreed basis. The fourteen first parties to this agreement consisted of and included all of the eight plaintiffs in the suit, and six of the defendants therein, some of whom were heirs at law, but not legatees. The second party to the agreement was the residuary devisee and legatee, Mathilda A. Puller, a defendant in the suit therein and herein, and to whom was devised the larger part of the estate. An agreement guaranteeing her fulfillment and performance of

this contract was executed by her husband and co-defendant Edward S. Puller.

By this agreement, and in consideration of the covenants of Mathilda A. Puller, and of the guaranty of Edward S. Puller, all of the parties of the first part affirmed said will as the last and lawful will of the testatrix and admitted and agreed that it was and might be proven and taken as such without further objection on their part, and agreed that upon the payment of the sum of \$9500 to them their interest in said estate, whether as heirs or legatees, should vest in said Mathilda A. Puller. Of the \$9500 thus stipulated, \$1500 was to be applied to the payment of attorneys' fees and costs which had accrued in the suit, and the balance of \$8000 was to be paid in equal shares of \$1000 to each of the eight parties directly interested. It is further alleged that all of the parties to this agreement were of lawful age and legally capable of contracting. This sum of \$9500 was to be paid to plaintiff for himself and as trustee for his beneficiaries whenever the second party received from the estate an amount equal thereto.

It is further alleged that the parties of the first part fully performed the agreement on their part and made no further contest of the will and no further efforts to prosecute the suit; that they appeared by their attorney in open court and announced their desire to discontinue its prosecution and fully informed the court of the terms and purpose of the compromise agreement. Thereafter, Sadie Ferree, an heir and legatee and one of the defendants in the suit, but not a party to the compromise agreement, was permitted, by order of court, to plead as a party plaintiff, and to continue the prosecution of the action. She filed her petition as *sole* party plaintiff, and, as such, prosecuted the suit in the circuit court, where a judgment

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sustaining the will was rendered. She afterwards took an appeal, but this she dismissed, and the will then became finally established. None of the parties to the agreement rendered voluntary aid or assistance to her in the prosecution of this action, but some of them, after being duly subpoenaed, testified at the trial concerning facts within their knowledge.

The petition alleges as a breach of contract by the defendants, that, although on July 8, 1911, there was turned over and paid to Mathilda A. Puller, by way of partial distribution of her residuary legacy, assets of the estate to the actual cash value of \$75,000, the defendants herein have failed and refused, and still fail and refuse, to pay, or cause to be paid, any part of the \$9500.

The demurrer to the petition was general, and was sustained upon the theory that the contract sued upon was, under the circumstances stated in the petition, void, as being against public policy.

OPINIONS.

This case hinges upon a single proposition. Respondents concede that settlements tending to avoid litigation and family discord, when joined in by *all* parties in interest, are favored by the law, and on this there can scarcely be any difference of opinion.

Family dissensions, like small streams, gather as they run, and when we consider their usual result we feel that it is sound public policy to encourage their allayment. Respondents urge, however, that the question of good or bad public policy depends upon whether the settlement was made by agreement of *all* or a *part* of those concerned, and if by only a *part*, then it is contrary to public policy, in that it tends to interfere with the ordinary course and administration of justice. Absent, in its various forms, the element of fraud, or

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unlawful or insufficient consideration, this distinction is not sound and is without justification.

The case of *Ridenbaugh v. Young*, 145 Mo. 274, relied upon principally by respondent, announces no contrary doctrine. In that case a suit had been brought to annul the will of plaintiff's deceased father. Plaintiff's sister and nephew, both devisees under the will, were made defendants. The plaintiff and his defendant sister, without the nephew's knowledge, agreed that plaintiff should prosecute the suit, and if he succeeded in having the will set aside he would pay his sister a certain sum; and, in consideration of this, she agreed to pay all costs and attorney's fees in the will contest suit. The crucial of that decision is thus expressed by its writer: "From reading this contract there is no escape from the conclusion that it was entered into for the purpose of defrauding George Young Ridenbaugh, and of imposing upon the court, under the pretense by Mary T. Ridenbaugh that she was acting in concert with her co-defendant, George Young Ridenbaugh, in resisting the suit to set aside the will, while at the same time she was conniving with her brother to bring about a different result, and had entered into a contract with him by which she was to pay the costs and lawyers' fees in the prosecution of the suit, and to receive from him in return therefor the sum of \$10,000 if the will was set aside. . . . It was not only a fraud upon one of the parties to a suit, but was an imposition on the court." To the doctrine thus announced we give our hearty concurrence, because a fraud of that caste should vitiate any agreement.

The case of *Gray v. McReynolds*, 65 Iowa, 461, was decided upon the same theory of actual fraud and wrongful intention.

The case of *Porter v. Jones*, 52 Mo. 399, was determined upon grounds of public fraud—the traffick-

ing in appointments of administrators, and the corrupt procuring of an appointment to an office of trust.

This is a substantial epitome of respondents' authorities, and, as seen, they do not sustain their contention. Ordinarily, a party has the legal right, at any time, to dismiss his suit upon such terms, and under such conditions, as he sees fit, and, under the authorities, it cannot be doubted that the agreement of a person, legally in a position to contest a will, to refrain from opposing its establishment is a sufficient consideration to support a promise to pay. By such forbearance the proponents of the will gain its establishment, insofar as the threatened contestant is concerned, and he, in turn, surrenders the power secured to him by law to protect rights which he believes exist, and which he otherwise might have legally established. We know of no rule of public policy which requires a person to contest his ancestor's sanity, or to continue a costly suit to the depletion of his own funds and those of the estate after his own rights have been conceded and secured. It is true that in this State it has been held a contestant cannot dismiss his suit in a will contest until due proof of the execution of the will has been made (*Hogan v. Hinchey*, 195 Mo. 527), but this does not preclude the parties, in the absence of fraud, even though some are exacting and dissatisfied, from agreeing upon the proof or conceding its sufficiency, and thus avoiding the expense and trouble of litigation. The primary purpose of this law is not to encourage litigation, but to prevent fraud in the establishment and probate of wills. Such a ruling, if bearing it has upon this subject, only tends to emphasize the right of one contestant to compromise and settle his own claims. This ruling prevents only and both the institution of contest suits within the statutory period by one person and his compromise thereof to the detriment and injustice of others who have re-

frained from filing suits because of the one instituted and the establishment of wills without due proof thereof. As was done in this case, any defendant, or co-plaintiff, who is not satisfied with the adjustment made by any one or more of the plaintiffs and defendants, can continue the prosecution of the suit and thereby prevent any prejudice to his rights.

In the case at hand there is no intimation of fraud or wrongful intention. Insofar as the allegations of the petition here go, the plaintiffs, in good faith, entered into an agreement which protected their rights and ended litigation. Its tendency was to promote family peace and harmony and avoid trouble and expense. There was no fraud perpetrated upon the court, as the terms and purpose of the compromise agreement were made known to the court. It is also evident that all parties to the action, both plaintiffs and defendants, were aware of the terms and purpose of the agreement, since the record discloses that upon its announcement in open court one of the parties defendant was made a party plaintiff, and continued to prosecute the action. No fraud was contemplated and none resulted; all interested parties were in court and had opportunity to object to the settlement if they saw fit. Other defendants cannot complain that their antagonists did not further pursue them, especially when, by their own actions, they invited a cessation of hostilities. Agreements similar to this have been quite uniformly upheld. [Grochowski v. Grochowski, 77 Neb. 506, 15 Am. & Eng. Ann. Cas. 300; 13 L. R. A. (N. S.) 484, and cases cited; Andrew v. Linebaugh, 260 Mo. 623; Barrett v. Carden, 65 Vt. 431; Waller's Admx. v. Marks, 100 Ky. 541; Moss v. Cohen, 158 N. Y. 240; Schoonmaker v. Gray, 208 N. Y. 209; Todd v. Todd, 159 Ill. 408.]

It is our opinion that the agreement sued upon was not contrary, but on the other hand conducive, to

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public policy, and that the trial court erred in holding to the contrary. The judgment is therefore reversed and the cause remanded, to be proceeded with in accordance with the views herein expressed. *Faris, P. J., and Walker, J.,* concur.

R. S. ANDERSON, Appellant, v. O. W. SHOCKLEY.

Division Two, January 6, 1916.

1. **SLANDER: Instruction: Confining Jury to Specific Charge.** In an action for slander, wherein the petition charges only that defendant in the presence of a named person called plaintiff a thief, an instruction which tells the jury that they cannot find for plaintiff unless they find from the evidence that defendant in the presence and hearing of said witness spoke the defamatory words stated, even though he spoke such words to other persons at different times and places, is not error, if to it is added, or by another instruction the jury are told, that the words spoken to others may be considered for the purpose of showing malice.
2. ———: ———: ———: **Malice: Pleading.** In a slander suit plaintiff must either confine himself to one publication as a basis of recovery, or charge each separate and distinct publication upon which he seeks a recovery in a separate count. But although he charges only one publication as the basis of his action, and can recover only for that, he is entitled to an instruction telling the jury that, if they find from the evidence that defendant spoke of and concerning plaintiff slanderous and defamatory words like those charged, they can consider such evidence as tending to show express malice. But he is not entitled to recover damages for such publication to others not charged.
3. ———: **Pleading: Rule Changed by Statute.** The common-law rule has not been so changed by statute as to relieve plaintiff in a slander suit from the necessity of definitely averring when and where the defamatory publication was made. The statute (Sec. 1837, R. S. 1909) has changed the rule only to the extent of relieving him of the necessity of alleging "any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter."

Appeal from Maries Circuit Court.—*Hon. John M. Williams*, Judge.

REVERSED, AND REMANDED.

C. C. Bland, J. J. Crites and L. V. Hutchison for appellant.

(1) The question whether or not the defendant was actuated by malice in uttering the defamatory words alleged in the petition was for the jury, and the court erred in refusing instruction number 8, asked by the plaintiff, authorizing the jury to take into consideration the evidence showing that defendant had on divers occasions prior to July, 1908, uttered defamatory words similar to those charged in the petition. 18 Am. & Eng. Ency. Law, p. 1012; *Anderson v. Shockley*, 159 Mo. App. 334; *Buckley v. Knapp*, 48 Mo. 152; *Callahan v. Ingram*, 122 Mo. 355; *Harrell v. Plimpton*, 166 Mass. 585; *Collins v. State*, 39 Tex. Crim. 30; *Casey v. Hulgán*, 118 Ind. 590; *Beneway v. Thorp*, 77 Mich. 181. (2) No person was named in the petition to whom, or in whose presence the defendant uttered the slanderous words charged in the petition, and it was competent for plaintiff to prove that he uttered the defamatory words in the presence of one or more persons, although the utterances may have been on different occasions, provided they were made within the time and at the place alleged, it being a question of fact for the jury as to whether or not there was a publication. 18 Am. & Eng. Ency. Law, p. 1013. And it was error to refuse to submit this question to the jury on Vaughn's testimony, as was done by the court in refusing instruction number 9 asked by the plaintiff. *Atwinger v. Fellner*, 46 Mo. 276; *Bradshaw v. Perdue*, 12 Ga. 510; *Downs v. Howley*, 112 Mass. 237; *Perry v. Potter*, 124 Mass. 338; Sec. 1837, R. S. 1909; *Johnson v. Bush*, 171 S. W. (Mo. App.) 636. (3)

By instruction number 4 given for the defendant the court narrowed the scope of the petition and testimony as to time and place of the utterances of the defamatory words, confined the plaintiff to a definite and particular date and to a located and specific place not alleged in the petition, and in effect withdrew the evidence of James F. Vaughan from the consideration of the jury, by whom plaintiff proved all of the slanderous words alleged in the petition, within the time and at the place alleged. This instruction in thus limiting both the place and the evidence is fatally defective. *Pottery Co. v. Folckemer*, 131 Mo. App. 105; *Eckard v. Transit Co.*, 190 Mo. 593; *Shanahan v. Transit Co.*, 109 Mo. App. 228; *Imboden v. Transit Co.*, 111 Mo. App. 220; *Phelan v. Paving Co.*, 115 Mo. App. 435; *Boyce v. Railroad*, 120 Mo. App. 175; *Rose v. Spies*, 44 Mo. 20; *Meyer v. Railroad*, 45 Mo. 137. The allegations that the slanderous words were uttered on about July 30th, at the county of Pulaski, did not require the plaintiff to prove their utterance on that particular date, nor confine him to proof of any special or particular spot or time in Pulaski County. *Black's Law Dict.*, p. 849; *Brown v. Riddle*, 3 Ala. App. 292; *Keer v. State*, 105 S. W. (Tex.) 54.

Frank H. Farris and *W. D. Johnson* for respondent.

(1) Appellant had a right, no doubt, to have the jury told that if they found for him, in assessing the damages sustained, they could take into consideration the publicity given thereto, by the repetition thereof of respondent, or by his speaking of words of similar import. This appellant did not ask, and having taken no action and made no request for such a declaration, he cannot now complain. *Estes v. Antrobus*, 1 Mo. 121; *Weaver v. Hendricks*, 30 Mo. 506; *Pennington v. Meeks*, 46 Mo. 220; *Barbee v. Hereford*, 48 Mo. 325;

Buckley v. Knapp, 48 Mo. 161; Hammon v. Douglas, 50 Mo. 442; Rammell v. Otis, 60 Mo. 366; Carpenter v. Hamilton, 185 Mo. 615; Isreal v. Isreal, 109 Mo. App. 373. (2) Testimony of other similar slanders at other times and places, and in the presence of other parties, could not be permitted as the basis of his cause of action, because it was of a different time and different place and of different words than that set out in his petition; and because such proof of such other slanders was only admissible to show the degree of publicity given to the slander, and to fix the probable damage which he may have sustained. Having elected and chosen the statement upon which he would base his action, and having proceeded upon it until the trial was complete, he could not be permitted to shift his action to another cause, entirely different from that which he had pleaded. 25 Cyc. 436; Walter v. Hoeffner, 51 Mo. App. 49; Pennington v. Meeks, 46 Mo. 217; Christal v. Craig, 80 Mo. 370; Lewis v. McDaniel, 82 Mo. 586; Vanloon v. Vanloon, 159 Mo. App. 269; Conran v. Fenn, 159 Mo. App. 681; Flowers v. Smith, 214 Mo. 129.

FARIS, P. J.—Plaintiff sued defendant in Pulaski County for slander. The venue was changed on the application of defendant to Maries County, where the case was tried, a verdict rendered for defendant and plaintiff appealed. The sum claimed as damages was ten thousand dollars; hence our jurisdiction. We may say in passing that this case has been tried before, wherein defendant mulcted in damages in the sum of \$1250, appealed and obtained a reversal and a new trial. [Anderson v. Shockley, 159 Mo. App. 334.] To the latter case reference is made for such of the facts as we may not deem it necessary to set out herein.

Since upon the instant appeal no points are made except as to the action of the court in giving three in-

structions, which we set out in our opinion, we need not here go very extensively into the facts. The petition upon which the trial below was had, contains but one count, the charging part of which and which alone is pertinent here, runs thus: "Plaintiff for his second amended petition herein states that the defendant on or about the 30th day of July, A. D. 1908, at the county of Pulaski, in the State of Missouri, wilfully, wantonly and maliciously spoke of and concerning the plaintiff, R. S. Anderson, certain false, defamatory and slanderous words, to-wit: 'R. S. Anderson (meaning the above-named plaintiff) is a thief; that he (meaning plaintiff) stole a set of harrow teeth from me and I can prove it by John Ormsby.' " Thereafter followed prayer for judgment in the ordinary form.

The evidence on the part of plaintiff tended to prove that about the latter part of July, 1908, at the railroad depot in the town of Crocker, in Pulaski County, defendant spoke to plaintiff in the presence of one Albert Manes sufficient of the words complained of to form substantially the statement set out in the petition. Testimony was also offered on the part of plaintiff that defendant at divers other times and places, particularly to one James F. Vaughan and to a certain J. M. Carmack, made statements of similar import, in which he charged plaintiff with having stolen his harrow teeth. The first instruction asked by plaintiff and given by the court made specific reference to the alleged defamatory words spoken in the presence of the witness Albert Manes.

The answer of defendant was, among other things not pertinent, a specific denial of the fact that he spoke the words charged. The proof of defendant tended to show that he had not spoken to plaintiff in the presence of witness Albert Manes the defamatory words alleged and shown by the testimony of said Manes, or in the presence of anyone else. The defense made a

very serious attack upon the general reputation of the witness Albert Manes for truth and veracity. In addition, the defense sought to impeach Manes by showing by other witnesses (who said they were present at the railroad station in Crocker at the time defendant is said by this witness to have uttered the words charged), that no such conversation was in fact had between defendant and plaintiff.

The three instructions complained of, the giving of one of which for defendant and the refusal of two of which for plaintiff constitute the only assignments of error, will be found set out in the opinion, together with such other facts as we may find to be necessary to make clear the discussion.

I. But three points are made by appellant, each of which as stated, has to do with instructions, either given or refused. At the request of defendant the learned trial court gave this instruction, to-wit:

**Confining Slander
to Charge.**

"No. 4. Unless you find from the evidence that the defendant spoke of and concerning plaintiff at Crocker, Missouri, on or about the 30th day of July, 1908, in the presence and hearing of witness Manes the alleged defamatory words stated in plaintiff's petition, you cannot find the issues for plaintiff, even though you may believe from the evidence that defendant spoke such words to other parties at different times and places."

Appellant contends that in this the learned judge *nisi* erred. We disallow this point and hold the instruction correct in principle. If it was adventitiously wrong, the fact was due to another error, which we hereafter discuss. It was the duty of plaintiff to confine himself to one publication as a basis of recovery; or else to have charged each separate and distinct publication upon which he sought recovery in a separate count. [Christal v. Craig, 80 Mo. 367.]

II. Appellant contends that the court erred in refusing to give at his request instructions numbered eight and nine, which are as follows:

**Slander Spoken
to Persons Not
Pleaded.**

"No. 8. The court instructs the jury that if you believe and find from the evidence that the defendant in the presence and hearing of J. M. Carmack, or others, spoke of and concerning plaintiff slanderous and defamatory words similar and of like import to those charged in the petition, they may consider such evidence as tending to prove express malice on the part of the defendant.

"No. 9. The court instructs the jury that if you believe and find from the evidence that at any time within two years of the time of filing this suit, to-wit, the 19th day of August, 1908, the defendant maliciously spoke of and concerning the plaintiff, R. S. Anderson, in the presence and hearing of James F. Vaughan the words alleged in the petition, to-wit: 'R. S. Anderson (meaning the plaintiff) is a thief. That he (meaning plaintiff) stole a set of harrow teeth from me and I can prove it by John Ormsby,' you will find the issues for the plaintiff and assess his damages at such sum as you may believe and find he is entitled to recover, not to exceed the sum of ten thousand dollars."

We are of the opinion that instruction eight should have been given and that the refusal of the court to give it constituted error for which this case must be reversed and remanded. We are, however, of the opinion that the court did not err in refusing to give instruction nine. The reasons for all three of these rulings are germane to each other and are such that all points raised can for brevity and clarity well be considered together. This is so, for the reason that if appellant's contentions are each the law, divers publications to divers persons at different times and

places could be pleaded in one count, proved upon trial, and plaintiff could pick and choose the one on which he would stand; or even, stand upon all and failing and refusing to elect, leave the jury to pick from among them some one or more publications on which to bottom a verdict. We have said that this is not the law; the contrary is well settled. On the other hand if it is the law as respondent contends that said instruction four was properly given and instruction eight properly refused, then a plaintiff in a slander suit is bound to the one publication specifically counted on and may not prove *for any purpose whatever* the fact of the publication, to others than those (if any) set out in his petition, of slanderous words of like or similar import to those charged in the petition. We think neither position is throughout correct; but since the rules of pleading and practice upon which a solution of these contentions turns, seem to have drifted away somewhat from both common law and the statute, we will examine them again briefly.

At common law it seems the pleader in a slander suit was required to allege when and where, and might if necessary to the defense be required to aver to whom, the publication was made. This is yet the law in England. [Odgers on Libel & Slander, 625.] Touching this rule the above learned writer says: "In cases of slander he [the plaintiff] must give the date of each slander, the names of the persons to whom, and the places where, each slander was uttered."

If such a bill of particulars could be required at common law in slander suits, or whatever the rule as regards definiteness and certainty in these behalves was at common law, it is the law yet in this State unless we have changed it by statute. But it is said that our statute (Sec. 1837, R. S. 1909) has changed the rule at common law requiring certainty of alle-

gation as to time and place of publication. [Atwinger v. Fellner, 46 Mo. 276; Johnson v. Bush, 186 Mo. App. 107.] Let us see if this is correct. The applicable part of our statute reads thus: "In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts *for the purpose of showing the application to the plaintiff of the defamatory matter* . . . but it shall be sufficient to state generally *that the same was published or spoken concerning the plaintiff*," etc. (Italics ours.) [Sec. 1837, supra.] The query which arises in construing this statute is: Wherein and to what extrinsic facts does it apply and what facts does it obviate the necessity of alleging? Manifestly, to such extrinsic facts as this term was technically used in a common-law declaration for slander, to designate, viz.: Such extrinsic facts as serve to show the "application to plaintiff of the defamatory matter," and touching this *purpose* and this only, "it shall be sufficient (i. e., to show the application of the defamatory matter to plaintiff) to state generally that the same was published or spoken concerning the plaintiff." [Newell, Slander & Libel, 728, 838; Dias v. Short, 16 How. Pr. (N. Y.) 322; Pike v. Van Wormer, 5 How. Pr. 171; Culver v. Van Anden, 4 Abb. Pr. 375.] In the case of Pike v. Van Wormer, supra, discussing the effect of the New York statute on pleading in actions for slander and libel, which statute we have carried bodily into our Code as section 1837, supra, WILLARD, J., said:

"The Code merely dispensed with the allegation of extrinsic facts, showing the application of the words to the plaintiff, in order to obviate the difficulty which was supposed to have been occasioned by the decision of the Supreme Court in Miller v. Maxwell, 16 Wend. (N. Y.) 9. It does not dispense with the necessity of an averment or innuendo when they become essential to show the meaning of the words themselves. In

these respects the rules of pleading remain unaltered."

Persuasive toward the correctness of this view is the fact that at common law a declaration for slander ordinarily contained, what was designated in the books on pleading as, an "averment of extrinsic matters," wherein it was set forth with much of sonorous phrase pending, or lately pending, matters in which plaintiff took part and likewise the part he took, which matters and acts were deemed to make clear wherein and why the slanderous words applied to him. [Newell on Slander & Libel, 838; Yates, Pleadings, 388.]

We think it is obviously a strained construction to interpret this statute as so far changing the common-law rule as to relieve plaintiff from the necessity of averring when publication was made, or from stating definitely where it was made. It is easy to see the non-necessity of the rule of definiteness and certainty as regards libel. Because it is difficult to imagine a case wherein the defense to a libel suit would be that no such writing existed, and cases are reasonably rare wherein the question of publication *vel non*, would become an issue. There might be questions mooted in defense as to whether the matter was libelous, or, as to whether defendant had part in the publication, and rarely, but not ordinarily, as to the fact of publication. But touching defamatory words spoken, or alleged so to be, so crying a necessity to hold to the common law exists that it ought not to be lightly cast aside at the behest of a statute which, if it means what it has been said to mean, is so glaringly ambiguous. If the defense be that the words spoken were true, in short, justification, then obviously it makes no difference when, where or to whom these words were spoken, barring such objection as might arise from the Statute of Limitations. But if the defense be as here that defendant did not speak the words charged, it is ap-

parent that every rule of fairness demands that defendant be informed specifically if he desires the information for his defense, as to the time and place, at least, where the alleged defamatory words were spoken. Otherwise it is difficult to see how a defendant, being innocent of the publication, could defend himself adequately in the action, or protect himself against conspiracy and perjury. Any other view smacks of the ambushade and of lying in wait, privileges which we have long prided ourselves upon having abdicated when we abandoned common-law pleading.

It is obviously unthinkable that plaintiff under all circumstances may merely aver "that to-wit: On or about one year from the date hereof, defendant at the city of St. Louis, wilfully, wantonly and maliciously spoke and published of and concerning the plaintiff," etc., without averring definitely when or where, or to whom of the six hundred and eighty-seven thousand inhabitants of that city the alleged defamatory words were spoken, and that he may, whatever the defense is, refuse on motion to that end, to make his petition more definite and certain. It is to be conceded of course that in practically every case of libel, from the very nature of the case, no necessity would exist for a so-called bill of particulars, and that in many actions for slander it would suffice to aver publication generally, as to persons and to aver time and place under a *videlicet*, but for the reasons stated it would not fairly or reasonably suffice, at least as against a motion to make more definite and certain, in a case of alleged slander wherein the defense is not guilty.

The case of *Atwinger v. Fellner*, *supra*, was correctly ruled upon the concrete facts up for judgment. While the petition under discussion in that case contained "no allegation that the words were uttered in

the presence of any one," yet no attack was made upon that petition *till after verdict*. Clearly, a petition which merely averred the fact of publication generally, without descending into a bill of particulars, would not be fatally defective, or liable to successful assault after verdict, but would be cured by the Statute of Jeofails. [State ex inf. v. Arkansas Lumber Co., 260 Mo. l. c. 283; 31 Cyc. 761, and cases cited; Sec. 19, p. 671, G. S. 1865.] No other cases have been found in this State which deal with this matter of sufficiency of pleading, except the Atwinger and Johnson cases, *supra*. In other American jurisdictions the rule as to definiteness of allegation as to the time and place at which, and the person or persons to whom, the slander was published, is thus stated by Cyc.:

"It is generally held sufficient in an action for slander to allege that the words were spoken or uttered by defendant in the presence of some third person or persons and the names of such person or persons need not be given. So it has been held that an averment that defendant 'published' the defamatory matter is good, as the word 'published' imports that the words were spoken in the presence of some third person. The petition should allege with exactness the time when and the place where the publication was made, and it has been held that any indefiniteness in these respects will render the petition insufficient as against a demurrer." [25 Cyc. 446.]

Touching the right of defendant, who may be otherwise wholly unable to prepare his adequate defense, to have the petition made more definite and certain, the rule in other jurisdictions is thus stated by Cyc.: "It is generally held that defendant is entitled to know definitely the time and place of the publication of the alleged slander or libel and the name of a party to whom publication was made, and if com-

plaint fails to show these particulars, a bill [of particulars] will be ordered." [25 Cyc. 467.]

From these authorities and reasons we think it should be ruled (a) that the plaintiff in an action for slander (and in libel as well where need arise) on motion to make more definite and certain, may be required to set forth when and where and to whom the alleged defamatory words were published; (b) that since each publication of defamatory words constitutes a separate cause of action, every such publication must be separately pleaded in separate counts of the petition, and (c) that no recovery can be had for the publication of a slander which is not pleaded, but (d) other publications of defamatory words of similar import to those pleaded may be shown by the evidence for the purpose of showing express malice in augmentation of damages, either actual or punitive. Of course, plaintiff ought not in his proof to be held always to strict accuracy as to time, so long as the variance may not bring him foul of the Statute of Limitations, or mislead defendant to his hurt, or amount to a palpable fraud upon the court.

From these conclusions it results that instruction four given for defendant, while stating correct principles of law, did not go far enough when standing alone and without the aid of instruction eight, offered by plaintiff and erroneously refused by the court. Both of these instructions were proper if given together, but the learned trial court having refused the instruction requested by plaintiff which correctly set out the office and effect of evidence of other publications, should then have modified instruction four by an apt statement of the purpose for which the jury could consider other publications of defamatory statements of like or similar import, or else refused it. For in the last analysis the concrete result of giving this instruction under the circumstances and in the

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form as given was to let this testimony of other publications into the case and then at the end to remove it wholly from the jury's consideration; to tell them in effect, that they need not consider it for any purpose. *Arguendo* we may say (though *we would not and do not now write* such a reason into the law) that the jury being more or less subject to the suspicions and frailties of other humans, might, but for this instruction, have argued the probability of defendant's having spoken the words complained of to the witness Manes from the fact that he had spoken them to so many other persons.

It follows that for the failure of the trial court to give instruction eight, *supra*, this case must be reversed and remanded for a new trial in a manner not inconsistent with the views herein set down. Let this be done. All concur.

GARRETT L. CARMODY, Administrator of Estate
of JOHN L. CARMODY, Appellant, v. MARY A.
CARMODY.

Division Two, January 6, 1916.

1. **EVIDENCE: Circumstance.** In a suit by an administrator against decedent's wife to recover bonds, which she claims as her own, testimony by an attorney that at a time certain decedent brought his wife to his office and stated the circumstance of a loss of bonds belonging to his wife and not in suit, is admissible as tending to show that at that time she owned and possessed bonds, and as a circumstance from which an inference may be drawn throwing some light upon the purpose for which both held a joint interest in the safety deposit box in which the bonds in suit were kept.
2. **ADMINISTRATION: Bonds in Widow's Possession: Instruction: Where She Claims as Purchaser.** In a suit by the administrator against decedent's widow to recover bonds in her possession, which she claims to own as a purchaser, and not as a gift from her husband, it is error to refuse an in-

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struction declaring that if decedent, in his lifetime, purchased and paid for the bonds and they were delivered into his possession at the time of the purchase, the finding must be for plaintiff.

3. ———: ———: Answers to Interrogatories: As Pleadings and Evidence. In a suit by an administrator to recover bonds in the possession of decedent's wife claimed by her as the owner, the written interrogatories propounded to her for answer and her written answers thereto are to be considered merely as pleadings in the case, and the statements contained in said answers cannot take the place of testimony, but testimony should be offered upon the trial as in any other case.
4. ———: ———: ———: ———: Walver. Nor does the filing of interrogatories in such a case constitute a waiver of the incompetency of the wife to testify to transactions between her and her deceased husband involving the cause of action and at issue.
5. ———: ———: ———: Instruction. In such a case an instruction declaring that the statements made in the answers to the interrogatories propounded by the administrator to the wife that are in her own favor are not competent as evidence, and do not tend to prove, nor can they be considered as tending to prove, that the wife owned or acquired by gift or purchase from her husband, or otherwise, any of the bonds, is a correct declaration of law, and being applicable to the facts should be given.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

REVERSED AND REMANDED.

Johnson, Rutledge & Lashly, Holland, Rutledge & Lashly and *Blevins & Jamison* for appellant.

(1) The evidence does not show that the bonds in issue in this suit were purchased with the money of Mary A. Carmody. *Tygard v. Falor*, 163 Mo. 234; *Terry v. Glover*, 235 Mo. 544. (2) It does not show a gift *inter vivos* between deceased and defendant. *Keyl v. Westinghaus*, 42 Mo. App. 57; *Godard v. Conroy*, 125 Mo. App. 174; *Terry v. Glover*, 235 Mo. 549. (3) Under the pleadings and the admitted facts, the finding and judgment should have been for the

plaintiff. See authorities above. (4) The court erred in admitting testimony by Thomas K. Skinker, and in refusing to give declaration number 8 striking said testimony from the record. (5) The court erred in admitting the testimony of the defendant in her own behalf. *Terry v. Glover*, 235 Mo. 544; *Tygard v. Falor*, 163 Mo. 235. (6) The court erred in refusing to give declaration number 2. The interrogatories and answers merely constitute the pleadings in the case. They were in no sense evidence in favor of the defendant. *Tygard v. Falor*, 163 Mo. 242; *In re Estate of Hoffman*, 132 Mo. App. 63.

Walter B. Douglas for respondent.

(1) The issue to be tried in this case is substantially this: Were the bonds here in question, or any of them, the property of John L. Carmody prior to the time of his death? On this issue the administrator has the affirmative, and, therefore, the burden of proof. *Tygard v. Falor*, 163 Mo. 245. (2) The evidence offered is insufficient to make out a prima-facie case in favor of the administrator. *State v. Taylor*, 134 Mo. 151; *Gentry v. McReynolds*, 12 Mo. 533; *Coughlin v. Ryan*, 43 Mo. 99; *Welch v. Welch*, 63 Mo. 57; *McCoy v. Hyatt*, 80 Mo. 130; *Schooler v. Schooler*, 18 Mo. App. 77; *Abbott v. Trust Co.*, 149 Mo. App. 514; *Fair v. Wynne*, 155 Mo. App. 343; *Hopper v. Hopper*, 84 Mo. App. 120; *Farwell v. Cramer*, 38 Neb. 66; *Gordon v. Eans*, 97 Mo. 600; *Jackson v. Jackson*, 10 Mo. 121; *Wheeler v. Wheeler*, 43 Conn. 507.

WILLIAMS, C.—This is a proceeding originally instituted in the probate court of the city of St. Louis, under the provisions of section 70 et seq., Revised Statutes 1909, whereby the administrator of the estate of John L. Carmody, deceased, seeks to recover from

Mary A. Carmody certain assets which it is alleged that she is wrongfully withholding from the estate. The specific property in dispute consists of eleven one-thousand-dollar bonds of the State of Coahuila de Zaragoza, Mexico; two municipal bonds of Buchanan, Georgia, for three hundred dollars each. Mary A. Carmody is the widow of John L. Carmody. Pursuant to the citation, she appeared in the probate court and denied the allegations of the affidavit, whereupon interrogatories were filed and she answered the same under oath. Trial was had in the probate court, resulting in favor of Mary A. Carmody, and the administrator took an appeal to the circuit court of the city of St. Louis, and upon trial in the circuit court before the judge, sitting as a jury, judgment was entered in favor of the defendant and the administrator duly perfected an appeal to this court.

Answers were made to forty interrogatories and are quite lengthy. Sufficiently for the purposes here, we will state, in narrative form, the answers made to the interrogatories, as follows:

“My name is Mary A. Carmody and I am the widow of John L. Carmody. We were married in New York in 1867 and continued to reside together until the day of his death, July 30, 1908. At the time of our marriage, I had something less than one hundred dollars in money and my husband had three or four hundred dollars in money. The first year after I was married, my father, in Ireland, sent me seventy dollars and, in 1869, my husband gave me a Christmas present of one hundred dollars. The first year or so after our marriage, my husband was engaged in the hardware business in Cincinnati; then he ran a store for railroad contractors for four years; then he was a street car conductor for four years; then he ran a hotel for about a year; then he worked as a salesman in a post-trader's store at Fort Sill, Indian Territory, for

three years; then we lived on a ranch in Kansas for three years, raising stock; then for about seven years he ran a post-trader's store at Jefferson Barracks for Major McVean. He worked for about nine months for Garrett L. Carmody in a grocery store and also kept books for nine months for T. W. Scott. During all this time, the salary which he received was from thirty dollars a month, being the lowest salary received, to one hundred dollars a month, being the highest salary received. During seven years of our married life, I kept boarding house and from that source saved about eleven hundred dollars. What I saved was invested and the interest therefrom was also invested. For about nineteen years I collected rents for my husband, which amounted to about eighty or a hundred dollars a month, and I received three per cent for collecting the same.

"In 1868, my husband bought a bond at Covington for one hundred dollars, and after keeping it a few months sold it. He bought some bonds in 1876 at Fort Sill, but sold them and used the money to buy the Kansas ranch. In June, 1908, my husband bought two five-hundred-dollar bonds of the Knights of Columbus for 'something over one thousand dollars.' He bought the Knights of Columbus bonds from the Mercantile Trust Company. My husband did not own any bonds at the time of his death. He gave me the Knights of Columbus bonds. The Knights of Columbus bonds are now in possession of the administrator, but they belong to me. I have acquired bonds during the period of my marriage and have owned bonds for twenty-four years or more. Twenty-four years ago, I owned bonds amounting to three thousand dollars or thirty-seven hundred dollars. The proceeds of those bonds and the interest was reinvested until I now have eleven thousand dollars in bonds. For about fifteen years my husband had a safety deposit box at the

St. Louis Safe Deposit Company and later at the Mercantile Trust Company. I had access to the box, prior to my husband's death. At the suggestion of my husband, I took ten thousand dollars in bonds out of the box, in March, 1908, and carried them home and put them in the desk. He said that I had better take them out to avoid any trouble about getting at the box in case of his death. They are now in my possession. It is not true that the bonds were purchased by my deceased husband with his own means and funds. The bonds were bought with my means. My husband may have added at times some small amount of his own money to make up an even sum, but he never gave me any statement of how much and I never knew. In 1890 I lost some bonds, three thousand dollars or three thousand seven hundred dollars worth of bonds, and had to sue for the money. My husband used to manage my business for me. He would sell, trade and re-invest so it is impossible for me to recollect what I had in any particular year. At the time of my husband's death, I, individually, owned eleven Mexican bonds for one thousand dollars each, two Knights of Columbus bonds for five hundred dollars each, and two Georgia bonds for three hundred dollars each. I never directly purchased any of these bonds. My husband always attended to such matters for me. The following is a list of the bonds in my possession, under my control, at the time of my husband's death:

"Bonds of the State of Coahuila de Zaragoza, Mexico, dated April 1, 1900, payable April 1, 1940, interest 6 per cent, numbers 12, 146, 147, 206, 378, 379, 566, 639, 640, 641, 642, each for one thousand dollars; two bonds of the town of Buchanan, Georgia, for three hundred dollars each; two bonds of the Knights of Columbus for five hundred dollars each. The eleven Mexican bonds are now in my possession. The ad-

ministrator has possession of the Knights of Columbus bonds.”

The evidence upon the part of the plaintiff tended to establish the following facts:

John W. Donaldson, president of the John W. Donaldson Bond and Stock Company, testified that he sold John L. Carmody the following bonds: One lot of bonds of Mt. Pleasant Township, Bates county, Missouri; two bonds of Buchanan, Georgia, for three hundred dollars each, and one one-thousand-dollar bond, being bond No. 12, of the State of Coahuila, Mexico. That these bonds were paid for by Mr. Carmody, and were delivered to him at the time of his purchase, and that they sold the Mexican bond at a little above par. That the Mt. Pleasant Township bonds were afterwards lost, and witness introduced Mr. Carmody to Mr. Skinker and Mr. Skinker brought suit against the county to recover the money.

Mr. William H. Young testified that in 1905 and 1906 he was connected with the Noel-Young Stock Company and that his company sold the following bonds to John L. Carmody, to-wit: On December 28, 1905, bond No. 566 of the State of Coahuila, Mexico, the par value being one thousand dollars, bearing six per cent interest. It was sold above par, the exact price being 109. On June 18, 1906, two one-thousand-dollar bonds of the same kind, being numbers 146 and 147, were sold to Mr. Carmody. They were sold at 110. On May, 1908, a one-thousand-dollar bond of the same kind, being No. 206. It was sold at 107, plus interest. These four bonds were paid for by John L. Carmody and were delivered to him and a bill of sale of the same was made to John L. Carmody.

Walter A. Wilkinson, cashier of the bond department of the Mercantile Trust Company, testified that his company sold to Mr. Carmody, on April 26, 1905, one one-thousand-dollar Mexican-government four-per-

cent bond, at 94. The number of the bond was 7749, and that this bond was, on May 23, 1905, sent to New York to be exchanged for a permanent bond, No. 34374. Nine hundred and fifty-six dollars and eleven cents was paid for the bond. This same company, on May 6, 1908, also sold one thousand dollars worth of the Knights of Columbus building bonds to John L. Carmody; the two bonds were for five hundred dollars each and were numbers 82 and 84.

Joseph J. Reynolds, assistant manager of the Mercantile Trust Company safe deposit vaults, testified that from February 9, 1906, until September 30, 1908, safety deposit box No. 11339 *was rented jointly in the name of John L. Carmody and Mrs. Mary A. Carmody*. On September 30, 1908, at the request of Mrs. Carmody, John L. Carmody's name was erased from the records (this was after the death of John L. Carmody). This witness also testified that his records show that Mary A. Carmody had access to this box on March 23, 1908, and again on August 3, 1908. By access, the witness said he meant that "the person had visited the box."

The evidence upon the part of the defendant tended to establish the following facts:

Thomas K. Skinker testified that, in 1890 or 1891, John L. Carmody brought Mrs. Mary A. Carmody to his office and stated the circumstances of the loss of some bonds which he said belonged to Mrs. Carmody, but which had been lost. The bonds were the Mt. Pleasant Township bonds of Bates County. Suit was brought in the name of Mrs. Carmody and about \$2500 was recovered for her. On cross-examination, the witness was interrogated about the depositions of John L. Carmody and Mrs. Carmody taken in the suit to recover on the lost bonds, in which Mr. Carmody testified that he made an outright gift of the bonds to Mrs. Carmody, and that if he needed the money to use in

any way, she would give the bonds back to him; and that Mrs. Carmody testified that when her husband first bought the bonds, "it was considered that they were mine."

Defendant offered in evidence the deposition of Father J. J. Godfrey. This witness testified that he received a letter from John L. Carmody inquiring if he should pay taxes on some money or property which the writer had laid aside for his wife. The letter was written about four years prior to the death of Mr. Carmody.

Walter B. Douglas testified that the plaintiff, administrator, upon the hearing of this cause in the probate court, testified that John L. Carmody, his brother, at one time bought for him a one-thousand-dollar four-per-cent Mexican bond, and that he gave his brother money to pay for the bond and that his brother kept the bond. Later he desired to sell the bond and his brother paid him back the money invested in the bond.

I. It is contended that the court erred in admitting the testimony of Thomas K. Skinker. In this connection, it is urged that the bonds, concerning which Mr. Skinker testified, are not the ones here involved, and hence his testimony is not material to the issues in the present suit. It is true that the bonds mentioned in the witness's testimony are not the ones now in issue, but we think the witness's testimony was admissible. It tended to show that, as far back as 1890, Mrs. Carmody owned and possessed bonds valued at \$2500, or more, and we think it a circumstance from which an inference might properly arise throwing some light upon the purpose for which she held a joint interest in the safety deposit box which contained the present bonds. It is, of course, but a slight circumstance, but we think it was properly admitted in evidence.

Evidence:
Circumstance.

II. It is contended that the court erred in refusing to give appellant's declaration of law numbered 1. The substantial portion of this declaration was, as follows:

“The court declares the law to be that if the court, sitting as a jury, shall find from the evidence that the said John L. Carmody, deceased, in his life-
Rights as Purchaser. time, purchased all or any of the bonds from Noel-Young Bond Company or the Donaldson Bond & Stock Company or the Mercantile Trust Company and paid for the same and that said bonds were delivered into his possession at the time when he purchased them, then the finding will be for the plaintiff, and the defendant is guilty of wrongfully withholding from the estate of her deceased husband all of the said bonds which the court may find from the evidence were so purchased and paid for by the defendant's deceased husband.”

We are of the opinion that this declaration should have been given. There was no issue in this case that Mrs. Carmody was the owner of the bonds in dispute, by reason of a gift from her husband, but her defense, as we gather it from the pleadings, was that she purchased and paid for the bonds when originally purchased, and that she was, therefore, the owner, as original purchaser. The theory of the plaintiff was that these bonds, or at least some of them, were the property of the estate because John L. Carmody had purchased them and paid for them.

III. It is further contended that the court erred in refusing appellant's declaration of law numbered 2. The main portion of this declaration was as follows:

“The court declares the law to be that the statements made in the answers filed by the defendant to

Interrogatories
and Answers
As Evidence.

the interrogatories propounded by the plaintiff that are in her own favor are not competent as evidence, nor do they tend to prove, nor can they be considered by the court as tending to prove, that the defendant owned or acquired by gift or purchased from her husband, or otherwise, any of the bonds, the title to which is in controversy in this action. And the court, sitting as a jury, will not consider as evidence answers made by defendant in her own interest, but will exclude from its consideration such answers," etc.

We are of the opinion that the foregoing was a correct declaration of law, applicable to the case and should have been given.

In the case of *Tygard v. Falor*, 163 Mo. 234, it was held that, in proceedings of this kind, the issues to be tried are settled and definitely fixed by the interrogatories and the answers made thereto. That being true, the interrogatories and answers are to be considered merely as pleadings in the case, and the statements contained in said answers (excepting, of course, admissions or confessions therein contained against the interest of the person answering) could not take the place of testimony, but the testimony should be offered upon the trial of the case as in any other trial.

In the present case, Mrs. Carmody would not, of course, be a competent witness to testify to transactions between herself and her deceased husband, involving the cause of action or issue now on trial. [Sec. 6354, R. S. 1909.] And it was held in *Tygard v. Falor*, *supra*, that the filing of the interrogatories in a case of this kind did not act as a waiver of the incompetency as a witness of the person answering the interrogatories. The judgment is reversed and the cause remanded. *Roy, C.*, concurs.

PER CURIAM: The foregoing opinion by WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

GROOME WHITTELEY et al., Appellants, v.
JAMES CONNIEFF et al.

Division Two, January 6, 1916.

1. **MINOR: Sale of Land: By Curator Appointed Without Notice: Constitutional Right.** When the Legislature as *parens patriae* takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for his education and support, it does not deny to him the equal protection of the laws, but gives him the protection of laws especially designed for his protection; it does not take from him his property, but uses it for his benefit. And the sale of a non-resident minor's land by a curator who was appointed by the probate court without notice to the minor of the application for such appointment, if otherwise done in harmony with the statute, which in 1879 did not require such notice, did not violate the provision of the Federal Constitution guaranteeing to him the equal protection of the laws, or the provision of the State Constitution declaring his property shall not be taken without due process of law.
2. **NON-RESIDENT MINOR: Over Fourteen Years: Choosing Curator.** The General Statutes of 1865 did not give to a non-resident minor having real estate in this State, either under or over fourteen years of age, the right to choose his curator, or to have notice of the application for the appointment of a curator.
3. **———: Curator: Interloper.** A person who has been appointed curator of the estate of a non-resident minor at the suggestion and upon the application of another who holds a power of attorney from the minor's mother and adult sister for the sale of their interests in the same lands, and who sold those interests to the same persons who purchased from the curator, cannot properly be characterized as an interloper.
4. **———: Sale of Lands: Notice of Order of Sale.** The General Statutes of 1865 did not require that notice be given the minor of an application by the curator for an order of court to sell the lands of the minor.
5. **CURATOR: Resignation: No Formal Discharge: Sale by Subsequent Appointee.** Where the resignation of a duly appointed curator has been accepted by the probate court by an

Whittelsey v. Conniff.

order entered of record, the fact that he was not formally discharged will not affect a sale of the minor's land by a subsequent curator duly appointed.

Appeal from Jefferson Circuit Court.—*Hon. E. M. Dearing*, Judge.

AFFIRMED.

W. D. Isenberg and Crews & Cantwell for appellants.

(1) The English and American authorities are numberless that the power of courts to divest an infant of his lands, whether the court deems it to his advantage or not, does not exist, in the absence of a statute. The decisions in Missouri so uniformly hold that it is unnecessary to cite authorities of other States. *Heady v. Crouse*, 203 Mo. 100; *Young v. Downley*, 150 Mo. 317; *Capen v. Garrison*, 193 Mo. 335. (2) This is particularly true in the case of a non-resident infant who owns a remainder in lands in this State. The State of Missouri has no power to direct his education, or to supervise his care and maintenance. If his property in this State be needed for his education and support, the courts of the State having power over the person of the infant should first be resorted to. This is the policy of the statute law. The enumeration in the statute of certain purposes for and conditions under which such sales of lands of infants may be made excludes all other purposes and conditions, and means that the land cannot be sold except within the terms of the statute. *Capen v. Garrison*, 193 Mo. 335; *Blackburn v. Bolan*, 88 Mo. 80. It is only when the statute expressly provides that lands of non-resident infants may come under the jurisdiction of the probate court that said jurisdiction

can exist. When such conditions are complied with, then all of the other requirements as to notice which are applicable to the estate of a resident minor and for his protection, should apply, with greater reason, to the estate of the non-resident infant. Notice of some sort, at some time or stage of the proceedings by which the property of an infant may be divested, is absolutely essential. It may be that a child of tender years is required to take notice of all that his curator may do after he knows who his curator is, but no case has ever yet held that any human being is bound by the acts of another of whose very existence he has had neither knowledge nor notice of any kind. Such a proceeding would violate the provisions of the State Constitution providing for due process of law, and would violate the provision of the Federal Constitution guaranteeing the equal protection of the laws. *Jones v. Gore*, 142 Mo. 45; *Roth v. Gilbert*, 123 Mo. 29; *Clark v. Mitchell*, 64 Mo. 564; *Lemon v. Buchanan Board*, 108 Mo. 241. (3) There was no jurisdiction to appoint the curator; there was no jurisdiction to order the sale or to confirm it. Cases above, and *Carden v. Culberson*, 100 Mo. 269.

James Booth for respondent, *Owen McCourt*.

(1) The appointment of O'Rourke as curator of the estates of the non-resident minors was expressly authorized by the statute then in force. Sec. 6, chap. 12, *Wagner's Stat.* 1872; Sec. 414, *R. S.* 1909. (2) The appointment was regular and fair on the face of the record, reciting every jurisdictional fact. Sec. 6, chap. 12, *Wagner's Stat.* 1872. (3) Under section 12, of said chapter, no notice was required of the application for the appointment of O'Rourke. *Wallace v. Tinney*, 145 Iowa, 478; *Clark v. Cordis*, 4 Allen, 466. (4) The application for the order to sell and the order sustaining it as well as the order of approval of sale, were all regular and good on the face of the rec-

ord. Sec. 28, chap. 66, Wagner's Stat. 1872. (5) Statutes authorizing the appointment of a curator of the estate of a non-resident minor who owns property within the jurisdiction of the court, are by no means unusual and are universally upheld by the courts of the State where in force. *Wallace v. Tinney*, 145 Iowa, 466; *Woerner's Am. Law of Guardianship*, sec. 28, pp. 87, 88; *Tiffany's Persons and Domestic Relations*, sec. 306, p. 158; *Land Co. v. Kurtz*, 45 Minn. 380; *Davis v. Hudson*, 29 Minn. 27. (6) The actions of the probate court in appointing O'Rourke curator and making its order of sale, together with its order approving that sale being fair and regular on the face of the record, is not the subject of collateral attack in this action. *Hope v. Blair*, 105 Mo. 93; *Carr v. Spanagel*, 4 Mo. App. 288; *Frye v. Kimball*, 16 Mo. 21; *Overton v. Johnson*, 17 Mo. 442; *Ruggles v. Webster*, 55 Mo. 246; *Cox v. Boyce*, 152 Mo. 582; *Johnson v. Beasley*, 55 Mo. 256; *Rowden v. Brown*, 91 Mo. 429; *Noland v. Barrett*, 122 Mo. 181; *Smith v. Black*, 231 Mo. 681; *Robbins v. Boulware*, 190 Mo. 33; *Wilkerson v. Allen*, 67 Mo. 502. (7) No notice of the curator's application for order of sale was required to give the court jurisdiction. *Ancell v. Bridge Co.*, 223 Mo. 209. (8) The record showed that the proceeds of the sale were used for the education of the minors, and they are now estopped. They cannot in the same breath both accept and reject. *Fisher v. Siekman*, 125 Mo. 165. (9) The probate court was not required to expressly discharge Spencer before appointing O'Rourke. Spencer having paid over according to the court's order all the assets in his hands and his resignation having been accepted, coupled with the fact that the court afterwards appointed O'Rourke, shows by necessary implication that Spencer was discharged. *Pattee v. Thomas*, 58 Mo. 163; *Henry v. McKerlie*, 78 Mo. 416. (10) The law views with disfavor titles of

the ancient character of that claimed by appellants. Hubbard v. Slavens, 218 Mo. 615.

ROY, C.—This is a suit under section 2535 of our Revised Statutes to quiet title to lot 8, containing 146 acres, and lot 9, containing 90 acres, all in subdivision 10 of U. S. Survey 1897, except ninety-five acres described in the petition, all in Jefferson county.

Plaintiffs are the children of Charles C. Whittelsey, a lawyer of St. Louis, who died in March, 1875, the owner of all of said lots 8 and 9, and also the owner of lands in the city of St. Louis, and in St. Louis county outside of said city. His will was duly admitted to probate, by which he devised all his property to his wife, Anna G., for life, with remainder to his heirs. He left surviving him six children, who were also the children of said Anna G., and were all minors.

In July, 1875, while the widow and children were residing in St. Louis, Richard H. Spencer was duly appointed curator of said minors. The only personal assets he ever received of said minors was \$324.52 each, on a policy of insurance on their father's life.

About June 27, 1878, Spencer tendered to the court his resignation as such curator, having duly published a notice of his intention to do so, and his resignation was by entry of record accepted by the court. There was no formal order of his discharge as such. His statements and vouchers show that he paid all the money in his hands to the mother of the minors for their education and support, all of which payments were approved by the court. Immediately after the appointment of Spencer as such curator, the mother and children removed their residence to Elkton, Maryland, where they resided until 1881, when they moved back to St. Louis. Lillian and Lucy died in 1886. The mother and Edith died in 1910.

On October 17, 1878, the widow executed a power of attorney to Phil V. Taylor of St. Louis to sell her interest in all of said lands; and on January 18, 1879, Alice G. Whittelsey, one of the children, who had then become of age, executed a similar power of attorney to Taylor.

On June 18, 1879, said Taylor filed in the probate court of St. Louis an application for the appointment of John F. O'Rourke as curator for the five children of Whittelsey who were still minors. That application stated that said minors Lucy and Iva were over fourteen years of age, and that Edith, Lillian and Groome were under fourteen years of age; that they resided out of this State and owned real estate in the City of St. Louis and in the counties of St. Louis and Jefferson. O'Rourke was thereupon appointed such curator and gave bond in \$1500 in the estate of each of said minors.

On June 24, 1879, the curator filed a petition for an order to sell said lands for the education and support of said minors, stating therein that the personal estate of said minors had been exhausted in their education and support. The court ordered that the land be sold at private sale. On October 4, 1879, that order was renewed. There is no showing on the record of the probate court or otherwise that there was ever published or served on said minors any notice either of the application for the appointment of such curator, or of the petition for the order of sale of the land. Lot 8 was appraised at seventy-five cents an acre and Lot 9 at twenty-five cents an acre, in all \$132. That appraisement was of the full value and not merely of the minors' interest therein. The minors' interests in those lots were sold under that order, and the sale was reported to, and approved by the court on January 10, 1880. That report contained the following:

“And Mrs. Ellen McNamee became the purchaser of so much of the land above described as being in the county of Jefferson, having made the highest offer that could be obtained for the same at the price of seventy-six 70/100 dollars, the same being over the appraised value of said minor’s interest in said parcels of land, the tenant for life being forty-six years of age, and the appraised value of the whole estate in said lands being one hundred and thirty-two dollars.”

On October 20, 1879, Phil V. Taylor under his powers of attorney executed two deeds to said Ellen J. McNamee, by one of which he conveyed the interest of the widow, Anna G. Whittelsey, in the Jefferson county land, in consideration of \$97.80, and by the other he conveyed the interest of Alice G. Whittelsey for the consideration of \$25.35.

On August 19, 1880, Ellen J. McNamee conveyed the 236 acres to defendant McCourt for a consideration of \$600. On June 17, 1886, McCourt sold to James E. Shorb ninety-five acres of the land for a consideration of \$125, it being the part excepted in the petition. On November 1, 1888, McCourt conveyed to defendant Conniff forty acres of the land in controversy for a consideration of \$125. There is very little oral evidence as to the character of the land; but it does clearly appear that it lies on the Merimac river and overflows; that at the time of the curator’s sale it was in woods and unfenced, and that very little of it was cleared at the time of the trial.

I. Appellants say that the sale of a minor’s land by a curator who was appointed without any notice to the minor of the application for such appointment is a violation of constitutional law in two respects: First, that it violates the Federal Constitution by denying to him the equal protection of the laws; second, that it violates the State Constitution by taking

Notice of
Application for
Appointment
of Curator.

his property without due process of law. There is one answer to be made to both those propositions: When the Legislature as *parens patriae* takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for the purposes of his education and support, it does not deny to him the equal protection of the laws, but gives him the benefit of laws especially designed for his protection; it does not take from him his property, but used it for his benefit.

In 1820 Chief Justice PARKER in *Rice v. Parkman*, 16 Mass. 326, said:

“No one imagines that, under this general authority, the Legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the Legislature is bound to do; and enabling him to derive subsistence, comfort, and education from property, which might otherwise be wholly useless during that period of life, when it might be most beneficially employed.

“If this be not true, then the general laws, under which so many estates of minors, persons *non compos mentis* and others, have been sold and converted into money, are unauthorized by the Constitution, and void. For the courts derive their authority from the Legislature, and it not being of a judicial nature, if the Legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress, who had unpro-

ductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government, that of providing for the welfare of the citizens, would be lost.”

In *Cochran v. Van Surley*, 20 Wend. (N. Y.) 365, the court said:

“But, as I have frequently had occasion to observe, an act of the Legislature which would have the effect to divest an individual of his property and transfer it to others for their own benefit, without compensation, or where there was no reason to suppose the person whose property was thus taken would be benefitted thereby, and contrary to the settled principles of law, would be void, as being against the spirit of our State Constitution, and not within the powers delegated to the Legislature by the people of this State. It is clearly, however, within the powers of the Legislature, as *parens patriae*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs.”

Cooley's Cons. Lim. (7 Ed.), pages 141 and 144, refers with approval to both those cases.

In *Stewart v. Griffith*, 33 Mo. l. c. 23, this court said:

“The view which we have taken of the subject is expressly based upon the idea that the act in question directs only the management of the property of the infants, changing its form and directing its use for their own benefit. Had the act undertaken to appropriate their property to the use of any other person it would have been void, because ‘retrospective in its operation’ by destroying rights previously vested by law.”

Nothing was expressly said in any of those cases on the subject of notice to the minor of the application for the appointment of the curator.

The following authorities held that no such notice is necessary unless the statute requires it: 21 Cyc. 29; Kurtz v. Railroad, 48 Minn. 339; Kurtz v. Land Co., 52 Minn. 140; Shroyer v. Richmond, 16 Ohio St. 455; Mahan v. Steele, 109 Ky. 31; Packard v. Ulrich, 106 Md. 246; Wallace v. Tinney, 145 Iowa, 478. In the latter case it was said:

“But we do not think that either the statute or any rule of constitutional law requires the giving of notice of an application for the appointment of a guardian of the property of a non-resident. Surely our statute does not require any notice, and, if it be required, it must be in virtue of some general rule of law or constitutional requirement. Doubtless no guardian may be appointed for the person of another without notice, and this is what the cases for appellant seem to hold. Some of them perhaps go so far as to hold that notice must be given if the appointment is to be of a guardian for the property. But we are constrained to take a different view.”

We observe that it is said in that case that some of the cases *perhaps* go so far as to hold that notice is necessary. A diligent search has failed to discover any case so holding, except those cases where the statute so required.

Those proceedings in the St. Louis Probate Court were had before Judge WOERNER who in his American Law of Administration, page 88, says that no notice to a minor is necessary unless called for by the statute.

Prior to our Constitution of 1865 the Legislature at every session passed numerous special bills for the sale of minor's lands. Few of them required any notice of any kind to the ward. Many of them failed

even to require a bond to secure the interests of the minor. In *Gannett v. Leonard*, 47 Mo. 205, it was held that such an act which did not require a bond was improvident legislation, but that it was not void. It further said:

“The power must be executed according to the statute; but the statute furnishes the rule by which we must judge of the legality of the transaction; and the dishonesty or subsequent misfortunes of the trustee, from which his beneficiaries suffer, should not be visited upon innocent purchasers when the statute has been followed.”

In *Garth v. Arnold*, 53 C. C. A. 200, Judge THAYER said:

“Concerning this question it is only necessary to say that it may be conceded to be well settled in the State of Missouri that, prior to the adoption of its Constitution of 1865, it was competent for the General Assembly, acting as *parens patriae*, to authorize by special laws the sale of lands belonging to minors and persons *non compos mentis*. The power in question had been repeatedly exercised and upheld. Indeed, the doctrine was so well established by local decisions, and so many titles had been acquired on the faith thereof, as to constitute it a rule of property. [*Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148; *Gannett v. Leonard*, 47 Mo. 205; *Shipp v. Klinger*, 54 Mo. 238; *Cargile v. Fernald*, 63 Mo. 304; *Clusky v. Burns*, 120 Mo. 567.] In one of these cases (*Shipp v. Klinger*) the Supreme Court of the State declined to go into the question of the right of the Legislature to exercise such a power, or to consider it as open for further discussion.”

The Constitution of 1865 provided that the Legislature should not by special law authorize the sale of a minor's land, but did not limit its power to provide for such sale by general law.

It is thus seen that when the statute is complied with the sale is valid.

The probate proceedings now under examination took place under the General Statutes of 1865. Section 3 of chapter 116 thereof provides that the court "shall appoint guardians to such minors under the age of fourteen years, and admit those over that age to choose guardians for themselves, subject to the approval of the court." Section 11 makes a similar provision for the appointment of a curator different from the guardian. Section 12 provides for the *appointment* of curators for non-resident minors, without any provision for a choice by the minor. Section 13 provides that a minor having a guardian or curator appointed by the court, may, upon attaining the age of fourteen years, choose another guardian or curator before the court *in the county of his residence*.

We think it clear that there is no choice of a curator given by that chapter to a non-resident minor. It may be, and probably is the case, that the statute giving the right of choice to a resident minor over fourteen years of age impliedly requires that he shall have notice in order that he may make such choice. We are not now deciding that point, but we do hold that in that chapter there is no provision that a non-resident minor, either under or over the age of fourteen years, shall have such choice or that he shall have any notice of the application for the appointment of his curator.

Appellants in their brief characterize O'Rourke as an "interloper." In that connection we have noticed that he was appointed at the suggestion of Phil V. Taylor, who was then the attorney in fact of the mother and adult sister for the sale of their interest in the same land, and who sold those interests to the same person who purchased from the curator, and at prices in harmony with the consideration paid the

curator. The interests of the minors were as well cared for as were those of the adults acting in their own right.

II. Appellants say that the sale is void because no notice was given of the application for an order to sell the land. They cite section 29 of chapter 116 of the General Statutes of 1865. We will not quote that section.

Notice of
Petition for
Sale of Minor's
Land.

It says nothing about how the order of sale shall be procured, but provides only that the sale shall be advertised and conducted as in case of sales made by executors and administrators for the payment of debts.

In *Pattee v. Thomas*, 58 Mo. 163, and in *Ancell v. Bridge Co.*, 223 Mo. 209, it was held that no such notice was necessary because the curator represents the ward, and that the latter was in court through such curator.

III. The fact that no express formal order of discharge of Spencer as curator was ever made does not render void the subsequent appointment of O'Rourke. It is not necessary for us to hold that the acceptance of his resignation was, for all purposes, equivalent to a discharge.

No Formal
Discharge of
Former Curator.

In *Cox v. Boyce*, 152 Mo. 576, a curator was appointed in Lincoln County, the place of the minor's residence. Subsequently both curator and ward removed to Howell County where the same curator was again appointed as such by the probate court of that county, no discharge or resignation of the curator having ever been made or entered in Lincoln County. There was a sale of land of the ward situate in Lincoln County under proceedings in the probate court of Howell County. It was contended that those proceedings were *coram non judice* and void because of the

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pre-existing curatorship. It was held that such original curatorship might have been sufficient cause in a direct proceeding to rescind the appointment in Howell County, but that such fact could not be shown in a collateral proceeding to annul the judgment of a court of competent jurisdiction. O'Rourke was a duly appointed curator and the sale made by him, valid in all other respects, cannot be thus collaterally assailed. The judgment is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of Roy, C., is adopted as the opinion of the court; *Faris, P. J.*, and *Walker, J.*, concur; *Revelle, J.*, not sitting.

THE STATE ex rel. ARTHUR J. SCHMOHL v.
JAMES ELLISON et al.

In Banc, February 9, 1916.

CONTRACTS: Insurance Policy and Supplement: Construing Together. Where by the main policy an insurance company promised to pay ten thousand dollars to insured's mother in case of his accidental death "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running-board of railway or street railway cars)," and in the concurrent and separately signed supplement, supported by the one stipulated premium and attached to said main policy, promised to pay to insured five thousand dollars in case of the death of his mother "while riding as a passenger in a railway passenger car," the court cannot, in a suit by the insured to recover for the accidental death of his mother, which occurred as she was attempting to pass, in the nighttime, from one car of a fast moving train, across the unvestibuled platforms, to another car, consider the two contracts as one, and so construe them together as to hold that, though the covenants are independent and divisible, the words "while riding as a passenger in a railway passenger car," standing alone, mean while riding anywhere on the car, but when read in connection with the

State ex rel. v. Ellison.

words contained in the main policy they do not mean while riding on the platform of a passenger car, but only inside the car; and by so construing the two instruments together, and thereby reaching the conclusion that the insured could not recover, the Court of Appeals violated the rule announced in *Trabue v. Insurance Co.*, 121 Mo. 75, and *Owings v. McKenzie*, 133 Mo. 325. The subject-matters of the two contracts are distinct, and they cannot be held to be one contract for the purpose of limiting the language of the one by the terms of the other.

Certiorari.

JUDGMENT QUASHED.

Robert A. Brown and *A. Leonard Guitar* for relator.

(1) The opinion and decision of the Kansas City Court of Appeals in construing the language "while riding as a passenger in a railway passenger car" to mean while riding as a passenger on the inside of a passenger car, construed the contract most favorably to the insurance company instead of to the insured, in direct opposition to and in conflict with the controlling decisions of this court, which hold that all such contracts must be construed most favorably to the insured. *Bruner v. Wheaton*, 46 Mo. 367; *Mathews v. Modern Woodmen*, 236 Mo. 342; *Shoe Co. v. Casualty Co.*, 172 Mo. 149. (2) The decision of the Kansas City Court of Appeals, in holding that relator could not recover, and in construing the words "while riding as a passenger in a railway passenger car" to mean while riding as a passenger inside of a passenger car, is in conflict with the decisions of the St. Louis Court of Appeals of this State. *Styx v. Indemnity Co.*, 175 Mo. App. 171; *Hays v. Benevolent Assn.*, 127 Mo. App. 195; *Bradshaw v. Benevolent Assn.*, 112 Mo. App. 435. The decision of respondents, being in conflict with the decisions above cited, estab-

lishes different rules of law in different parts of the State and renders this court "supreme in name only." Section 8 of Amendment of 1884; Section 3, article 6, Constitution of 1875. This court has said that the Constitution means just what it says, and that it is the duty of this court to see that the laws of the State are uniform, and to that end to exercise its authority through the writ of *certiorari*. State ex rel. v. Broadus, 238 Mo. 201; State ex rel. v. Broaddus, 245 Mo. 135. (3) In holding that the supplemental contract of insurance under consideration should be construed in the light of the conditions and provisions of the contract of insurance issued to the relator, the respondents set aside and held for naught the decisions of this court, which held that before contracts may be read and construed together in order to determine the proper construction to be placed upon the provisions thereof, such contracts should be between the same parties, intended to accomplish the same purpose and executed in the course of the same transaction. Owings v. McKenzie, 133 Mo. 334; Kennedy v. Broderick, 216 Fed. 138; Trabue v. Ins. Co., 121 Mo. 84. (4) The words "while riding as a passenger in a railway passenger car," used in the insurance supplement, mean "while riding in, on or upon a railway passenger car." Such words must be given the meaning they ordinarily bear, and if there be any doubt as to the meaning of the language used in an insurance policy every doubt must be resolved in favor of the insured. Andrews v. State, 70 S. E. 111; Ins. Co. v. Muir, 126 Fed. 926; King v. Ins. Co., 28 S. E. 662; Berliner v. Ins. Co., 53 Pac. 918; Theobold v. Assurance Co., 26 Eng. L. & Eq. 432; Barber v. Ins. Co., 165 Ill. App. 239; DePue v. Ins. Co., 166 Fed. 183; Ramsey v. Ins. Co., 160 Mo. App. 238.

O. C. Mosman and Vinton Pike for judgment defendant.

(1) The question before the Court of Appeals was: Was Mrs. Schmohl "riding as a passenger in a railway passenger car," while she was attempting to pass from one car to another of a rapidly moving train? The question was not new or unusual. It has been before the courts of New York and the Federal courts of this circuit. In *Aetna Insurance Company v. Vandecar*, 86 Fed. 282, the terms of the policy were "while riding as a passenger in a passenger conveyance using steam." Vandecar was on the platform steps when he was hurt. The appeal was heard by Sanborn, Thayer and Riner, JJ. The majority held that Vandecar's accident was not within the terms of the policy. They did not stick to the letter merely, but gave the terms a reasonable interpretation, as the courts of this State have always done in such cases. The words used "clearly indicated the intention of the parties," and that they meant to stipulate for indemnity while the insured was riding in an exceptionally safe place. "One who rides as a passenger in a passenger conveyance using steam, occupies such a place. But one who rides on, but not in, such a conveyance, whether on the platform, or on top of the car, or on the machinery beneath it, occupies a very dangerous place," and the parties neither agreed nor intended to agree to insure one who rode in such a position. The same question was also before the court in *Van Bokkelen v. Travelers Insurance Company*, 54 N. Y. S. 307, affirmed by the Court of Appeals, 60 N. E. 1121. There the terms were "while riding as a passenger in any passenger conveyance." Mrs. Schmohl was insured as a passenger or traveler. The supplement applied "solely and exclusively to passengers or travelers," and "the position that the company is not liable cannot be controverted." This utterance of this court was in

the case of *Brown v. R. P. Assur. Co.*, 45 Mo. 225, and it is the last and only utterance of this court directly to the point. In *Banta v. Casualty Co.*, 134 Mo. App. 222, the St. Louis Court of Appeals cited the *Vandecar* and *Van Bokkelen* cases with approval. (2) "In" is a word used to express the relation of presence, existence, situation, inclusion, action, etc., within limits, as of place, time, condition, circumstances, etc. In this policy it expressed the relation of place, and means "within the bounds or limits of; within; as in the house; in the city; to keep a subject in mind." Cent. Dict. "On," as used of place or position, with regard to the upper and external part of something. Cent. Dict. "In the whole; in guard, and the like" are archaic, now more commonly expressed by on. *Idem*. A statute required an officer to post a notice in his office, and he returned that he had posted it at his office. "This is a clear non-compliance with the statute, too apparent and substantial to require further consideration than mere mention." "Certain it is that these words (in and at) are not synonymous, and may have very different meanings, depending upon their connection." *Hilgers v. Quinzey*, 51 Wis. 71. "The definition of 'in' by Webster is 'within;' 'inside of;' and with such meaning the preposition is commonly and generally used." *Verdine v. Olney*, 77 Mich. 320. See also *New York v. Second Ave. R. Co.*, 31 Hun, 245. " 'In' signifies the quality of being interior." *Scales v. Mas. Pro. Assn.*, 70 N. H. 491. "When we think merely of the local or geographical point, we use at; when we think of inclusive space, we employ in." Stand. Dict. At. (3) Judge Thayer's dissenting opinion in the *Vandecar* case very aptly and decisively requires Mrs. Schmohl to have been inside the four walls of the car to be within the protection of the policy supplement. He objected to a literal application of the terms, because to his mind it put too much

stress on a single word; and he would take more latitude in considering the circumstances—a course which in most cases would conduct the court into difficult complications. But as the facts in this case are clearly settled and stated, he would have had no difficulty in concluding there could be no recovery. This was his view of what the policy meant. (4) In construing contracts the plain written terms are to be given effect, whatever the result may be. “The rule that an insurance contract is to be construed most strongly against the insurer is to be resorted to only where the language or some of the terms of the contract, after the use of such helps as are proper, remain of doubtful import.” *Foot v. Ins. Co.*, 61 N. Y. 571. “The prime rule for the construction of contracts is that the intent of the parties as disclosed by their language be given effect.” *Hanna v. Land Co.*, 126 Mo. 1; *Knapp v. Publishers*, 127 Mo. 53. “A contract of insurance differs in no respect from other contracts, as to the rules for their interpretation.” *Renshaw v. Ins. Co.*, 103 Mo. 604. *Verba fortius accipiuntur contra proferentem* is not exclusively a canon of this court. It is as liberally applied in New York and the Federal courts as in this State. 9 Cyc. 590, 591; *Matthews v. Ins. Co.*, 154 N. Y. 449; *Rickerson v. Ins. Co.*, 149 N. Y. 307. The Kansas City Court applies the rule every day. *Newman v. Standard Accid. Co.*, 177 S. W. 803; *Still v. Ins. Co.*, 172 S. W. 625; *Ins. Co. v. K. C. El. L. Co.*, 171 S. W. 580; *Matthews v. Modern Woodmen of America*, 236 Mo. 326. The words here are clear and unambiguous. So the courts had said in the cases above cited, and so says relator. But relator asked the Court of Appeals to consider them doubtful or indefinite, and then in the language of the St. Louis Court of Appeals, “to seize upon them with violent hands and distort them so as to include a risk clearly excluded by the insurance contract.” *Mitchell v. Acci-*

dent Co., 179 Mo. App. 7. He stipulated that the court should "first construe the terms of the policy and supplement." "Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used." *Brawley v. U. S.*, 96 U. S. 174; *Merriam v. U. S.*, 107 U. S. 443; *The Calabria*, 24 Fed. 607. It is not necessary that the parties to each instrument be the same, if the instruments are known to all the parties. *McDonald v. Wolff*, 40 Mo. App. 309.

GRAVES, J.—*Certiorari* to the Kansas City Court of Appeals. The case may be stated in small compass. Judge JOHNSON of the Court of Appeals in an opinion filed, thus states some of the substantial facts:

"This is an action on a policy of accident insurance issued by defendant, June 7, 1912, and in force at the time of the injury and death of the assured. The defense is that the cause of the injury was one for which the policy provided no indemnity. A jury was waived, the cause was submitted on agreed facts, judgment was rendered for plaintiff and defendant appealed.

"Defendant, for a premium paid by the plaintiff, Arthur J. Schmohl, and upon his application, issued to him an accident policy in which his mother, Anna Schmohl, was named as beneficiary and which, in its 'Schedule of Indemnities,' provided for the payment of \$10,000 to the beneficiary in the event of his death resulting from injuries sustained 'while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running-board of railway or street railway cars.)' Attached to this policy and as part of the

obligations assumed by defendant in consideration of the stipulated premium, was a supplementary policy in which Anna Schmohl, the mother, was the assured and plaintiff the beneficiary. The undertaking of defendant in this 'supplement' was 'to insure Anna Schmohl, the mother of the insured under policy No. F. B. 4420, issued to Arthur J. Schmohl against loss resulting from bodily injuries effected directly and independently of all other causes through external, violent and accidental means (suicide, sane or insane not included) while riding as a passenger in a railway passenger car or vessel licensed for the transportation of passengers, provided in either case by a common carrier and propelled by mechanical power.'

"Mrs. Schmohl was accidentally killed in Germany, June 20, 1913, while riding as a passenger on a passenger train, and this suit is for the recovery of the indemnity provided in the supplementary policy.

"Mrs. Schmohl, accompanied by her friend, Frau Pauline Frank, became a passenger on a train running from Esslingen to Nuertingen. The cars were similar in interior arrangement to the ordinary American passenger coach, but the train was not vestibuled and the platform at the ends of the cars were unenclosed. Where two cars were coupled together there was rather a wide space between the platforms which was spanned by a sheet iron folding bridge slightly arched. A person in going from one car to the next would cross this bridge which was not provided with guards. On the inside of the door of each car a notice was posted which read: 'Stepping onto the platform and step-board while the car is in motion is forbidden.'

"Mrs. Frank testified that before boarding the train, Mrs. Schmohl spoke of not feeling well, that she was cold, 'that everything around her seemed to dance in a circle, and that she had a feeling as if spiders were running up her legs.' After the train started

and while they were seated in a car, Mrs. Schmohl declared her intention of going to the next car, to see if a mutual friend who was intending to go on that train were there. Mrs. Frank testified, 'I dissuaded her from doing so, saying that passengers were forbidden to leave the car while the train is in motion and that a penalty is attached to doing so.' This warning was disregarded, Mrs. Schmohl replying that 'she always does it in America,' left her seat and proceeded to the platform. Mrs. Frank observed her as she disappeared through the door. No one saw her fall from the train and, as stated in the agreed facts, 'it does not appear and is not known by what means or from what cause deceased fell or was thrown from said platform or steps.'

"It is agreed that 'after she had passed through the door on to the platform and while on the platform aforesaid, she fell or was thrown from the train to the ground, receiving injuries from which she instantly died.'

"The only reasonable inference that may be drawn from the disclosed facts and circumstances is that the assured accidentally fell or was thrown by the motion of the train while she was endeavoring to pass from one car to another. The burden is upon plaintiff to show that the cause of his mother's death was accidental and violent. The latter fact being conceded, the existence of the former will be presumed in the absence of proof to the contrary. In showing a violent cause plaintiff made out a prima-facie case of an accidental cause. [Insurance Co. v. McConkey, 127 U. S. 661; Travelers' Ins. Co. v. Melick, 65 Fed. 178; Paul v. Travelers' Ins. Co., 112 N. Y. 472; Lovelace v. Travelers' Protective Assn., 126 Mo. 104; Collins v. Fidelity & Casualty Co., 63 Mo. App. 253; Phelan v. Travelers' Ins. Co., 38 Mo. App. 640; Young v. Railway Mail Assn., 126 Mo. App. 1. c. 335; U. S. Mutual

Accident Assn. v. Barry, 131 U. S. 100; Beile v. Protective Assn. of America, 155 Mo. App. 629.]

"It is conceded the accident occurred while Mrs. Schmohl was riding upon a moving train on the open platform or unguarded bridge and, therefore, while she was not in the interior of a passenger car, and the principal question for our solution is whether or not she was 'riding as a passenger in a railway passenger car' within the meaning the supplementary policy was intended by the parties to give to that term."

Later on in the opinion the learned jurist takes up both provisions in the two policies, and ultimately holds that the words used in the supplemental policy restricts the right of the beneficiary therein, relator herein, to recover only for such accident as might have occurred to relator's mother whilst actually within the car in which she was riding. This holding of course defeated relator's action, for the reason that the accident occurred while on the platform of the car, and not whilst the deceased was within the car. The ruling, it is averred, is contrary to our rulings, and hence the case is here.

I. It will be observed from the statement of this case, that there can be but two possible questions. First, whether the Court of Appeals was wrong in holding that the two contracts must be considered as one, and, secondly, if right in this construction, whether or not their views upon the merits of the case is diverse from views previously expressed by this court. Of course, there would also be the question as to whether or not the construction of the language in the supplemental contract was in accord with the views of this court. This case was tried upon an agreed statement of facts which is not set out in the opinion, yet the substance thereof is so set out. The learned judge of the Court of Appeals says:

“The weight of authority supports the view that such expressions in an accident policy as ‘riding in or on a public conveyance’ operated by a common carrier for the transportation of passengers should be construed as extending the liability of the insurer to injuries received while the insured is upon the platform of a moving train. The term ‘public conveyance,’ when applied to a passenger train on a steam railway, refers to the train, and not to any particular unit which enters into its composition. A passenger is in or on a public conveyance when he is riding as a passenger inside a car, on the platform of a car, or as in the Berliner case (*Berliner v. Ins. Co.*, 53 Pac. 918), when he is riding on the locomotive by invitation. And we agree with Judge THAYER’s view in the Vandecar case (*Aetna L. Ins. Co. v. Vandecar*, 86 Fed. 282) that to construe the word ‘in’ used in the phrase ‘in a passenger conveyance’ as meaning only inside a passenger car, is highly technical and, in our opinion, ignores the significance that should be attached to the selection by the insurer of the word ‘conveyance’ which, generally, is understood as referring to the entire train. As he well observes, people in ordinary conversation employ the terms ‘by train,’ ‘on a train’ and ‘in a train’ as synonymous, and it would be just as sensible to say that ‘in a train’ requires the insured to be inside a passenger car as to say that ‘in a passenger conveyance’ was intended to have no other meaning. All rules for the judicial interpretation of language employed in written contracts are merely a means to an end, and the end being to ascertain and enforce the mutual intention of the parties. Such intention is to be gathered from the whole instrument by weighing and giving proper consideration to all pertinent stipulations and expressions. Since the ordinary man who makes contracts is not expert in orthography, words should be given their common

everyday meaning and definitive refinements should be ignored.

“With these rules in mind we turn to the policy to gather from all its terms and provisions the expressed mutual intention of the parties with respect to the liability defendant assumed for injuries Mrs. Schmohl might receive, while traveling on steam railways. While the covenants in the supplementary policy were independent and divisible, both policies were parts of the same transaction, were supported by a single consideration and were one contract. In substance, defendant agreed to insure plaintiff and his mother for the stated premium and prescribed the terms upon which it would become liable as an insurer for personal injuries to each. To plaintiff it said: ‘If your death results from injuries you received while a passenger in or on a public conveyance provided by a common carrier, including the platforms of railway cars, we will pay your mother \$10,000,’ expressly granting to plaintiff, who is a young man, permission to ride on the platform of cars, but as to injuries the mother might receive, the liability defendant assumed was hedged about by most restrictive language. Not only was no express permission given her to ride upon car platforms while the train was in motion, but the broader term ‘in or on a public conveyance’ employed in the principal policy was narrowed in the supplementary policy to ‘in a railway passenger car.’

“If common sense is to prevail, as it should, in the construction of contracts, can there be any reasonable doubt that defendant clearly provided for immunity from liability except for injuries this comparatively old and inactive woman might sustain while riding inside a passenger car? Circumstances alter cases. As shown, ‘in,’ ‘on’ and ‘by’ may be used as synonyms and so may ‘in’ and ‘inside.’ The context and disclosed contractual purposes must often decide.

Plaintiff's interpretation of 'in a railway passenger car' gives that phrase the same meaning and scope as the phrase employed in the principal policy to define the liability for injuries to plaintiff, with its express permission to him to ride on car platforms. Obviously the parties did not intend the liability of the insurer should be the same in either event, but did endeavor to restrict liability for injuries to Mrs. Schmohl to those she might receive while riding inside a passenger car.

"The learned trial judge erred in rendering judgment for plaintiff. The judgment is reversed."

This portrays clearly the views of the Court of Appeals. They are (1) that the two contracts must be construed together to get the intent of the supplemental contract, and (2) when thus construed together, the meaning of the latter is that no recovery can be had, unless the accident occurred whilst the deceased was "in a passenger car" and not while she was on the platform thereof. We have, therefore, first, the question, whether under our rulings the Court of Appeals was right in holding that the two contracts must be construed together, and secondly, if they must be so construed, whether or not the construction given violates our holdings. There may also be the further question, whether or not, if the Court of Appeals erred in holding that the two instruments must be construed together the said court was in error, according to our rulings, in giving to the supplemental contract the construction given. The questions we take up in order.

II. It will be observed that the Court of Appeals says that the supplemental contract was attached to the principal contract. Copies of the two contracts are in the record. As a matter of fact they are on separate sheets, but this much we can gather from the statement of facts given by the learned judge who

wrote the opinion. The two papers refer to different subject-matters, i. e., one to indemnity for the accidental injury of Arthur J. Schmohl, and the other to indemnity for an accidental injury to Anna Schmohl. In the principal policy the obligation to pay is from the insurance company to Anna Schmohl, whilst in the latter the obligation is upon the part of the insurance company to Arthur J. Schmohl. The contracts are separately signed—the main contract by the insurance company and Arthur J. Schmohl; the “Supplement,” as it is headed and styled, is signed by the insurance company and Anna Schmohl. In these regards the two instruments are wholly separate and distinct, creating entirely different obligations and liabilities. The only things in common are (1) that the two instruments were executed at the same time and (2) that a single premium seems to have covered both contracts. What proportion was to carry the one or the other does not appear. The Court of Appeals says: “While the covenants in the supplementary policy were independent and divisible, both policies were parts of the same transaction, were supported by a single consideration and *were one contract.*” The italics are ours. The court might have added that the covenants were not only independent and divisible, but were very different. The two contracts do not cover the same subject-matter, and as a fact create different and distinct causes of action. They are executed by different parties, and the holding that they constituted *one contract* for the purpose of limiting the language of the one by the terms of the other was error. Not only was it error, but it was in violation of our rule in *Trabue v. Insurance Co.*, 121 Mo. 75, wherein we held that although the two subject-matters of insurance were in fact covered by one policy or contract, yet we should separate the provisions of the contract, as we found the same applicable to the different subject-

matters of insurance. The subject-matter of the two contracts here are as distinct as they were there. The ruling is likewise violative of our rule in *Owings v. McKenzie*, 133 Mo. 323, where we discuss the doctrine as to what is necessary to make two instruments executed at the same time, one contract.

III. The Court of Appeals concede in the opinion before us that, unless they can limit the meaning of the language used in the supplemental contract by the language found in the main contract, then the words used in the supplemental contract "while riding as a passenger in a railway passenger car" are broad enough to entitle recovery for an accident happening on the platform of such a car. Holding as we do that such court could not call these two instruments one contract for the purpose of limiting the meaning of this language in the contract sued on in this case, it follows that by their own concession the opinion is wrong. Their holding is predicated solely on the ground that they could give this language a limited meaning by reading it in connection with the other contract. Standing alone they say the plaintiff is entitled to recovery, and on that proposition cite and discuss the cases. If they entrench upon the decisions of this court in holding the two instruments to be one contract, as we hold, it necessarily follows that their judgment should be quashed, and it is so ordered. Other questions raised become immaterial under the above views. All concur, except *Bond, J.*, who dissents.

THE STATE ex rel. FRANK C. O'MALLEY, Administrator of Estate of MARGARET O'MALLEY, v. GEORGE D. REYNOLDS et al., Judges of St. Louis Court of Appeals.

In Banc, February 9, 1916.

1. **MECHANIC'S LIEN: Sufficient Description.** A description of materials furnished by a dealer in lumber when made in abbreviations and trade terms known and understood to be in use in the trade, is a compliance with the statutory requirement that "such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien" shall be filed; and a decision of the Court of Appeals so holding is in harmony with *Henry v. Plitt*, 84 Mo. 1. c. 241.
2. ———: ———: **Evidence of Items: Consolidation.** The mere fact that the lien account consolidates in one undated item several charges which show that each was for lumber of the same grade, quality, character and price, and which in the aggregate include the identical quantity of material and the identical amount charged in the consolidated bill, the whole being otherwise lienable matter, is not an objection the owner can urge against the lien claimant, even to the extent of avoiding the consolidated item, there being no proof of bad faith or of resulting injury to any one.
3. ———: ———: ———: ———: **As Affecting Whole Account.** In no event can the consolidation of a few items of the lien account, the aggregate amounts and charges being equal to the amounts and charges of the consolidated items, invalidate the whole lien account, whatever may be its effect upon the items so consolidated.
4. ———: ———: ———: **Excess in Summation.** The fact that the aggregate of the items in the bill of particulars exceeded those of the large lien account by the insignificant sum of \$2.46 is of no consequence.
5. ———: ———: ———: **Dates.** The absence of dates in connection with particular items in a lien account is not important, when it appears from the account that the materials were furnished between given dates which fall within the beginning and close of the account.

Certiorari.

WRIT QUASHED.

Frank C. O'Malley for relator.

Robert W. Hall for respondents.

BLAIR, J.—Relator was the defendant in the circuit court of the city of St. Louis in a mechanic's lien suit in which judgment went for him. The plaintiff in that court, The Banner Lumber Company, appealed to the St. Louis Court of Appeals, which reversed the judgment and remanded the cause for new trial; whereupon relator sued out this writ of *certiorari*, bringing here the record of the Court of Appeals.

In his brief, relator confines the questions he raises to those he asserts arise out of the facts stated in the opinion of the Court of Appeals. Not being asked to go beyond the opinion of that court for the facts, the question whether we can do so is not involved. Relator contends that the Court of Appeals failed to follow designated controlling decisions of this court upon the question as to (1) the sufficiency of the description in the lien paper, or account of plaintiff's demand, of the materials furnished; and (2) the sufficiency of the evidence offered in support of the lien account. The facts pertinent to each of these contentions, as here presented, will be stated in connection with the discussion of the questions of law raised for decision.

I. The Court of Appeals, in its opinion, describes the lien statement or "account of the demand," in so far as it concerns the issue here, as follows: "It"

	(the lien statement) "sets out that
Mechanic's Lien:	the plaintiff, with a view to avail it-
Abbreviated	self of the benefits of the mechanic's
Description	lien statute, 'files the account below
of Lumber.	set forth for the work and labor done
	and materials furnished by it under contract with J.

J. Robson, contractor,' etc. Then follows the description of the property, with the statement that the account filed is 'as per itemized bill attached hereto and marked "Exhibit A."' Then follows 'Exhibit A' which sets out the account of plaintiff with Robson, the contractor. It is dated April 1, 1908, and is on office stationery of the Banner Lumber Company. The various columns are headed 'date,' 'pieces,' 'sizes,' 'length,' 'feet,' 'prices,' 'amount,' 'total.' The account contains a long list of debit items expressed chiefly by abbreviations and trade terms. Among a number of credit items appear cash credits on account of 'lumber,' 'millwork,' and 'lath,' respectively."

Except as hereafter noted, these are all the facts appearing from the opinion of the Court of Appeals bearing upon the character of the lien statement or account so far as concerns the description of the materials furnished. Upon these facts, after discussing and quoting from numerous decisions, the Court of Appeals held: "It would appear that the lien account here in question sufficiently reveals the material for which the lien is sought to apprise the owner and the public of the nature thereof and to disclose that the demand is one within the lien law."

Relator insists this conclusion is in conflict with certain decisions, including the following decisions of this court: Mitchell Planing Mill Co. v. Allison, 138 Mo. 50; Grace v. Nesbitt, 109 Mo. 9; Rude v. Mitchell, 97 Mo. l. c. 373. .

The principle announced in those cases which relator contends is contravened by the decision of the Court of Appeals in the record before us is that "the account which this law contemplates is such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien. The account may consist of one or more items. It may be all on one side or mutual in its

showing. To be valid, it must disclose on its face that the demand is a sort within the terms of the lien law. When it calls for a just and true account, it means a fairly itemized account showing what the materials are and the work that was done and the price charged so that it can be seen from the face of the account that the law gives a lien therefor."

The specific complaint relator makes is that the "lien paper does not show on its face what it is for." This objection in the circumstances of this case amounts to a complaint that the Court of Appeals' description of the lien account shows that the account did not describe the materials furnished in the manner required by the statute as construed in the cases cited.

The real objection relator makes to the lien account is that the account does not sufficiently set out the character of the materials furnished; and the sole question this objection presents, when the Court of Appeals' statement of facts in this connection is analyzed, is whether a description of materials furnished when made in abbreviations and trade terms is a compliance with the statutory requirement that a "just and true account of the demand" shall be filed. [Sec. 8217, R. S. 1909.]

In *Henry v. Plitt*, 84 Mo. l. c. 241, and *Lumber Co. v. Edward B. Stoddard Co.*, 113 Mo. App. l. c. 314, 315, it was held that the use of abbreviations and trade terms in the description of the items of the account was permissible. In *Henry v. Plitt*, an item reading "May 8, 1880—3, 2, 12, 16, 96. . . . 17½ . . . \$1.68," under a heading indicating that the figures related to lumber, was held sufficient, the court saying the figures were "known by business men to mean, when applied to a lumber account, that on the eighth day of May, 1880, there were furnished three pieces of lumber 2x12 inches in thickness and width and sixteen feet long, aggregating ninety-six feet of lumber, which

at \$17½ per thousand, result in \$1.68 for the value thereof."

We have the record in that case before us. The heading of the account which is there said (84 Mo. l. c. 241) to show "that the figures relate to lumber" reads as follows:

"Henry, Barker & Coatsworth.

"Wholesale and Retail Dealers in Lumber, Lath, Shingles, Doors, Sash, Blinds, Moulding, Lime, Plaster, Hair, Cement, Building Paper and Paints.

"Sold to J. S. Southerland & Co., contractors with Mr. A. M. Plitt, Kansas City, Mo."

Then follows the account of several pages, a large per cent of the items in which are similar to that set out in the opinion. In that case, as in this, the account was upon a bill head or stationery which first stated the name of the lien claimant and then disclosed the character of its business. In that case there was an express statement that the claimant was in the lumber business. In this, there appears an equivalent disclosure, in that the heading shows that the claimant is a lumber company; that it is a corporation is apparent from its bringing the suit as it did; being a business corporation its name, necessarily, designates its business. [Sec. 3339, R. S. 1909.]

From the facts stated by the Court of Appeals it is clear the lien account in this case is well within the rule announced in *Henry v. Plitt*, supra.

Further, it is stated in the opinion of the Court of Appeals that the purpose of the suit was to enforce a lien for labor and materials "for the erection of certain buildings." In view of the fact that no point was made upon it, we are at liberty to assume that the lien account contained a statement of that character, describing the buildings.

From what has been said, it appears, therefore, that The Banner Lumber Company, a corporation en-

gaged in the lumber business, filed this lien account for the purpose of fixing a lien upon certain described property for materials used in the construction of designated buildings, and that the items of the lien account are for materials which are described in abbreviations and trade terms known and understood by business men as in use in the trade in which plaintiff's name disclosed it was engaged. The Court of Appeals so held, in effect. That this sort of description of the materials is, in such circumstances, sufficient under the statute (Sec. 8217, R. S. 1909) we have no doubt, and so held in the Plitt case. The lien account contemplated by the law "is such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien." [Mitchell Planing Co. v. Allison, 138 Mo. l. c. 56.] These liens "should not be defeated on mere technical grounds." [Rude v. Mitchell, 97 Mo. l. c. 374.] The statute is remedial "and should be construed with reasonable liberality." What is requisite is a "substantial compliance with all the requirements of the statute, according to its reasonable intent." [Grace v. Nesbitt, 109 Mo. l. c. 17.] These decisions are those which relator insists are opposed to the decision of the Court of Appeals upon the question before us. We discover nothing in them contrary to the conclusion reached by the court in Henry v. Plitt, *supra*, and think that case exactly in point, correct in principle and decisive of the question. There is ample authority outside this jurisdiction supporting the same proposition. Other decisions of the courts of appeals approach the same ruling closely. The case of Dwyer Brick Works v. Flanagan Bros., 87 Mo. App. 340, need not be critically examined since it is apparent it is distinguishable from this case.

II. Relator's second contention is, in substance, that there is no substantial evidence tending to sup-

port the lien account. This insistence is grounded upon the following facts. In the circuit court, plaintiff attached to the petition an account marked "Exhibit A," and referred to in the petition as "a bill of particulars." The Court of Appeals finds this exhibit differed in some respects from the lien account. In the first place, it contained items of the value of \$2.46 in addition to those appearing in the lien account. Also, it contained more items than the lien account; this resulting from the subdivision in the exhibit of some of the items of the lien account. Illustrating this, the Court of Appeals says the ninth item in the lien account was undated and for 7790 feet of star yellow pine flooring. In the exhibit this item was "subdivided into six items, which are scattered through the latter account," and the resulting items are given dates. There were several instances of this sort, though it is fairly inferable that relatively a small number of items were affected. The evidence taken before the first referee was directed to the proof of the various items as set out in the exhibit attached to the petition. The referee's report being set aside, the petition was amended so as to conform it exactly to the lien account. The cause was then referred to a second referee and submitted to him upon the evidence taken before the first referee. Relator contends there was, consequently, a total failure of proof, since, he says, plaintiff "by proving one account necessarily disproved the truth and justice of his own lien paper." The Court of Appeals decided against him on this question, and he urges this holding conflicts with the decision in *Coe v. Ritter*, 86 Mo. l. c. 287. In that case plaintiff brought ejectment, claiming under a deed of trust recorded August 9, 1873. Defendant's title depended upon a sale under a judgment in a mechanic's lien suit in which the claimant had judgment on September 21, 1874, upon a lien account, the first item in

which was charged as of September 2, 1873, over three weeks after the trust deed was recorded. Neither the trustee nor the beneficiary in the trust deed was a party to the proceeding. On the trial, defendant offered to show, contrary to the dates of the lien account, that the materials, upon the furnishing of which the lien depended, were actually furnished, in part, prior to the recording of the trust deed under which plaintiff claimed. Upon those facts, this court held, in substance, that the tenure of those interested in land ought not to be made to depend upon extrinsic evidence coming from the mere memory of (perhaps) interested witnesses, as against a permanent record designed to set out the facts. And the court concluded that, "a lienor must stand or fall by the lien which he files, and the dates and items which he specifies, and is not at liberty to defeat or postpone a prior lienor or incumbrancer by matter *in pais*." Relator here relies upon this last quoted sentence.

What the court said in that case is to be understood and applied in the light of the facts before it. That case is wholly unlike this, and that holding has no sort of bearing upon the question relator raises in this. There is no question here as to priorities between liens and incumbrances. This is simply a suit by the lien claimant. Relator endeavors to lift out of the opinion in *Coe v. Ritter* a statement applicable to the facts of that case and apply it broadly to a case in which the facts are wholly different. His contention, in the last analysis, is based upon the assumption that the exhibit attached to the original petition materially differs in its substance from the lien account. The fact that the aggregate of the items in the bill of particulars exceeded those of the lien account by the insignificant sum of \$2.46 is of no consequence. Relator is in no position to complain that the lien account did not contain all the items for which a lien might

have been maintained. There is no suggestion of bad faith, and bad faith could not easily be predicated upon an omission to include in the lien account items for which a lien might have been had but was not asked.

So far as concerns the items in the exhibit which seem to be consolidated in the lien account, it appears from the statement of the Court of Appeals that the aggregate amounts and charges are equal to the amounts and charges of the consolidated items in the lien account. In no event could the consolidation of a few items in this manner invalidate the whole lien account, whatever its effect upon the items so consolidated. [Walden v. Robertson, 120 Mo. l. c. 44, 45; Allen & Co. v. Mining & Smelting Co., 73 Mo. l. c. 693.] Further, the absence of dates in connection with particular items in a lien account is not important when, as here, it appears from the account that the materials were furnished between given dates which fall within the beginning and close of the account. [Ittner v. Hughes, 133 Mo. l. c. 691.] We are also of the opinion that the mere fact that the lien account, in the manner shown here, consolidates in one undated item several charges which show that each was for lumber of the same grade, quality, character and price and which, in the aggregate, include the identical quantity of material and the identical amount charged in the consolidated item, the whole being otherwise lienable matter, is not an objection the owner can urge as against the lien claimant even to the extent of avoiding the consolidated item, there being no proof of fraud or bad faith or suggestion of resulting injury to any one.

“These betterment statutes are remedial in their character, and, when reasonable and not oppressive, are to be liberally construed. . . . A fair and substantial compliance with the statute is all that is re-

quired." [Walden v. Robertson, 120 Mo. l. c. 43; McDermott v. Claas, 104 Mo. l. c. 23.]

Because of the errors it pointed out, the Court of Appeals properly reversed the judgment, and because the evidence fell short of proving a few of the items of the lien account, as the Court of Appeals held, it was necessary to remand the cause. Relator's argument that the remandment without a direction of judgment for respondent conclusively shows that the Court of Appeals found the evidence insufficient to support any judgment for plaintiff in the lien suit does not impress us. Our writ is quashed. All concur, *Bond, J.*, in result only.

THE STATE ex rel. FLAVEL B. TIFFANY et al. v.
JAMES ELLISON et al., Judges of Kansas City
Court of Appeals.

In Banc, February 9, 1916.

1. **CERTIORARI: Quashing Judgment of Court of Appeals.** The Supreme Court has constitutional authority to quash the judgment of a court of appeals in any case wherein its judgment has been the result of its refusal to follow the last previous ruling of the Supreme Court upon any matter of law or equity involved in the case.
2. ———: ———: **Statement of Facts.** Upon *certiorari* directed to a court of appeals, the Supreme Court can confine itself to the facts found by that court; this, upon the presumption that, where that court has undertaken to state the facts, it has stated all the facts of record upon the question in issue.
3. **EVIDENCE: Admission: Undenied Statement of Another.** A defendant cannot be charged with an undenied damaging voluntary statement made by a party out of his presence, when to deny it would require him to shout his denial up a stairway to a woman in the employ of his co-defendant.

Held, by WALKER, J., dissenting, that visual and immediate physical presence is not necessary to authorize the appli-

State ex rel. v. Ellison.

cation of the rule which renders testimony in regard to a damaging statement competent, and construes silence, under a proper condition, to be an admission of the truth of such statement; hearing and understanding, and not mere proximity, are the tests of the admissibility of such testimony.

4. ———: ———: ———: **Silence: Impertinence: Personal Security:** A failure by a defendant to reply to a damaging statement cannot be held to be an admission of its truth and is not admissible in evidence: first, if made under such circumstances as affords him no opportunity to reply, for instance, if the denial must be shouted up a stairway; second, if it is a voluntary statement made by the office girl or other mere employee of a co-defendant, who may have adverse interests, and therefore not demanding a denial; third, if voluntarily made by a stranger (that is, a person not a party to the action) and, therefore, an impertinence; and, fourth, if made under such circumstances that the defendant, as a matter of personal security, has a right to ignore it.

Held, by WALKER, J., dissenting, that, where two physicians had offices on different floors of the same building and the one below had treated the patient of the other, and when the officer came to serve the summons on them in the action for civil damages by the patient, the one below called up the stairs to the office girl of the other, to know if she had a record in the case, and she replied that she had and that the patient was the school teacher into whose eye he had dropped iodine and put it out, the answer was not a voluntary statement, nor an impertinence, but made by one whose authority to give it was recognized by the physician, and should have been admitted as evidence of his acquiescence therein.

5. ———: ———: **Probative Force.** A failure to deny or to reply to a voluntary statement made by a stranger to the action to a defendant, is the weakest of all evidence in probative force, and is not admissible as an admission of its truth except when made under such circumstances as point clearly to the necessity for a reply.

Certiorari.

RECORD QUASHED.

Fred A. Boxley, Denton Dunn and Scarritt, Scarritt, Jones & Miller for relators.

(1) The legal relation of Dr. Howard to plaintiff, as well as to Dr. Tiffany, upon this record was

that of an independent contractor and therefore, the demurrer of Dr. Tiffany should have been sustained on that ground. Plaintiff's evidence shows Dr. Tiffany never treated her nor was he present at such treatments. *Hillsdorf v. St. Louis*, 45 Mo. 95; *Myers v. Holborn*, 58 N. J. 193; *Keller v. Lewis*, 65 Ark. 578; *Pearl v. Railroad*, 176 Mass. 177; *Hagarty v. Railroad*, 100 Mo. App. 424. (2) The ruling of the Court of Appeals justifying the admission of the testimony of the deputy sheriff as to Dr. Howard's momentary silence, his lack of an instantaneous and smart repartee, to the remark of a young girl upstairs, and giving to it the probative effect of an admission on the part of Dr. Howard that he put iodine in plaintiff's eye and thereby put it out, is grievous error and runs counter to the decisions of this court. *State v. Hamilton*, 55 Mo. 520; *Phillips v. Towler*, 23 Mo. 401; *State v. Young*, 99 Mo. 666; *Bank v. Nichols*, 43 Mo. App. 385; *Adams v. Railroad*, 74 Mo. 553; *Wojtylak v. Coal Co.*, 188 Mo. 260; *Greenleaf on Evidence* (16 Ed.), sec. 198; *Larry v. Sherburne*, 2 Allen (Mass.), 34; *Whitney v. Holton*, 127 Mass. 527; *Carter v. Buchannon*, 3 Ga. 513; *Newman v. Commonwealth*, 28 Ky. L. Rep. 81.

W. M. Williams, Atwood & Hill and Park & Brown for respondents.

(1) We are confronted with a proposition which the Court of Appeals was not called upon to decide, and as to which there is no ground of conflict between the decisions of the Court of Appeals and this court. In the brief filed in the Court of Appeals the point was not raised that Dr. Howard was an independent contractor or that Dr. Tiffany was not plaintiff's physician. We will allow the defendants to answer this question themselves. Dr. Tiffany told plaintiff that plaintiff was in fact his patient. Dr. Howard testified that he assisted Dr. Tiffany when the latter was in

the city and attended to his practice when he was out of the city. At the time of these occurrences in February, 1909, he says he was employed upon a salary by Dr. Tiffany and acted for him in his stead during his absence. Dr. Tiffany says: "My assistant, Dr. Howard, and the office girl gave me a little history of the case." The Court of Appeals finds that Dr. Howard was merely the agent of Dr. Tiffany, and this is strictly in accord with *Logan v. Weltmer*, 180 Mo. 332, where it is held that a physician is liable for the negligence of his salaried assistant. (2) The testimony of deputy sheriff Wofford was admissible. There is no conflict whatever between the ruling of the Court of Appeals and either of the cases cited by defendant. The Court of Appeals could not have ruled otherwise in view of rulings in similar cases, viz., *State v. Lovell*, 235 Mo. 353; *State v. Burk*, 234 Mo. 578; *State v. Walker*, 78 Mo. 388; *Nelson v. Nelson*, 90 Mo. 463. This court has never in similar circumstances excluded the implied admission, but has always held that where a declaration affecting a party's interest has been made to such party by one immediately concerned upon a matter of which the party has personal knowledge the party's silence is an acquiescence implying an admission of the truth of the declaration. It is no objection that the admission may be in the form of a conclusion of fact. *Sparr v. Wellman*, 11 Mo. 230; *Brookfield v. Drury College*, 139 Mo. App. 339. Where a party is charged with a wrong, under circumstances which would naturally require an innocent man to speak, his silence is taken as an implied admission. There are no decisions of this court distinctly on the point, but we call attention to the following decisions of courts of high authority: *Cross Lake Logging Co. v. Joyce*, 83 Fed. 991; *Given v. Railroad*, 24 Ky. L. R. 1796; *Sumner v. Gardiner*, 184 Mass. 433; *Va. Chem. Co. v. Kirven*, 130 N. C. 161;

In re Snowball's Estate, 157 Cal. 310. Implied admissions in the nature of conclusions were received in Puett v. Beard, 86 Ind. 107; Oliver v. Railroad, 43 La. Ann. 804; Holston v. Railroad, 116 Ga. 658; Smith v. Duncan, 181 Mass. 435. The declaration of Rose McAllen was made in the ordinary course of her business and duty to defendant Tiffany and was receivable against him. Miss McAllen, the declarant, was in charge of the office of defendants. She was the medium of communication between plaintiff and Dr. Tiffany. She received the plaintiff, introduced her to Dr. Howard, made the notations in the book, and kept the records of the office. In other words, she was the recording officer of defendants' business. Defendant Tiffany, the owner of the business and the prospective recipient of a healthy fee, was not personally attending to his practice but was off on a pleasure trip, leaving Dr. Howard to attend to the professional work, and Miss McAllen to keep the records and attend to the business. On Dr. Tiffany's return and the consultation which occurred February 16, 1909, it was Miss McAllen's record which was examined. After a prima-facie agency has been shown, declarations of the agent made in the prosecution of the agency are admissible against the principal. Peck v. Ritchey, 66 Mo. 114; Northrup v. Insurance Co., 47 Mo. 435; Phillips v. Railroad, 211 Mo. 419; Hilbert v. Railroad, 20 Idaho, 54; Railway Co. v. Rhodes, 121 Pac. 769; Anvil Mfg. Co. v. Humble, 153 U. S. 540; Hall v. Herter Bros., 90 Hun, 280, 35 N. Y. Supp. 769; Express Co. v. Harris, 120 Ind. 73; Transportation Co. v. Leyson, 89 Ill. 43; McGowan v. Supreme Court, 104 Wis. 173, 185.

GRAVES, J.--Original action in *certiorari*, the purpose of which is to have quashed and for naught held, the judgment of the Kansas City Court of Appeals,

affirming a judgment of the circuit court of Jackson county in the case of Mary Coffey v. Flavel B. Tiffany and Joseph W. Howard. In the circuit court the judgment was originally for \$10,000, but for some reason not made clear by the record, the plaintiff *voluntarily* remitted principal and interest so as to make the judgment after *remittitur* just \$7500. The appeal thereupon went to the Kansas City Court of Appeals. This is one of a series of cases in *certiorari* pending in this court about the time the case of State ex rel. v. Robertson, 264 Mo. 661, was set for hearing. As a result, in the Robertson case, *supra*, we were accommodated with a wealth of briefs in an insignificant case, and among these were briefs and arguments from counsel in the case at bar. These of course went largely to the question of the jurisdiction of this court. We state this because we have in this case extended briefs upon the same question. The Court of Appeals affirmed the judgment of the circuit court, and in so doing it is charged that such court has ignored the last rulings of this court upon several questions therein involved. These questions we can take, so far as necessary, in proper order. The facts pertinent to each question had best be stated therewith.

I. Since the case of State ex rel. v. Broadus, 238 Mo. 189, it has been the custom of counsel to attack that ruling at each change in the membership of this court. The briefs upon the question of jurisdiction in the case at bar were prepared at a time when a very vigorous attack was being made upon the right of this court to quash the record of the Court of Appeals in a case wherein their pronouncement upon a given question of equity or law was at variance with the last previous rulings of this court. This virulent attack was the occasion of bringing into prominence the very small matter in issue in case of State ex rel. v. Robertson, 264 Mo. 671.

In that case the question of the right of this court to thus superintend the several courts of appeals, was fully, and we trust finally, settled. With the ruling in the Robertson case, *supra*, we are satisfied, and this question as argued in the briefs and oral arguments in the case at bar is ruled against the respondents. We hold, as we did, in the Robertson case, *supra*, that this court has the constitutional authority to quash the judgment of the Court of Appeals in any case wherein such judgment has been the result of a refusal by such Court of Appeals to follow the last previous ruling of this court upon any matter of law or equity involved in such case. The members of this court may differ and be divided upon what we will consider in determining whether or not the Court of Appeals has failed to follow our last previous rulings, but we are firmly fixed upon the question of our constitutional authority to act, and in the interest of harmony and unanimity of opinions in this State, it would be almost criminal negligence for this court to decline to use the authority expressly given, and perform the duty thus imposed. We can add nothing upon this question to what was said in the Robertson case, *supra*, and pass the question with a re-affirmance of the doctrine announced in that case.

II. In the disposition of this case, as I see the law, it will not be necessary to tread upon any disputed grounds. In other words, we can
Statement of Facts. confine ourselves to the facts found by the Court of Appeals in its opinion. By this we mean that where the court has undertaken to state the facts, we can presume that it has stated all the facts of record upon the question in issue. This we can do because the court is presumed to have done its full duty. It may be a violent presumption (in fact), and a glance at the record in this case has convinced us of the violence of the presumption in the particular case,

as we shall point out later. However, within well defined legal rules, we are justified in saying that the presumption is that the Court of Appeals has fully stated the facts upon the question involved.

During the course of the trial, the process server, who served the summons upon Dr. Howard, was permitted to testify to facts which the trial court considered tantamount to an admission of negligence by Dr. Howard. This evidence was duly objected to by both defendants.

**Admission
by Silence.**

It was excluded as to Dr. Tiffany and admitted as against Dr. Howard. The opinion thus describes the facts: "She brought this suit August 18, 1909, six months after the injury. The summons was served by a deputy sheriff who was introduced as a witness by plaintiff, and testified to what occurred at defendant's office when Dr. Howard was served. Dr. Tiffany was not in and after the papers were served on Dr. Howard, he and the witness went down stairs (the offices were on two floors), when Dr. Howard called upstairs to the clerk who had received plaintiff, and asked if she 'had a record of the Mary Coffey case.' The clerk answered that she had and that plaintiff 'was the school teacher that he dropped iodine in her eye and put it out.' Dr. Howard, who was standing by the side of witness, said nothing. Each defendant objected to this testimony and the court sustained the objection of Dr. Tiffany, but overruled that of Dr. Howard."

From the fact that this finding of facts does not say that the young woman spoken to was in the view and presence of Dr. Howard, and the process server, Mr. Wofford, we are justified in the conclusion that she was not in the actual presence of either, at the time. We said that the actual records in a case might make it appear to be a violent presumption to say that we would presume that the Court of Appeals had stated

all the facts. As demonstrating that matter, and for no other purpose, we quote from the actual evidence of the process server:

"Q. You went up there to serve the writ at Dr. Tiffany's office? A. Yes, sir.

"Q. Who did you see there? A. Dr. Howard, at the first. Dr. Tiffany was not there.

"Q. Dr. Tiffany was not there the first time? A. No.

"Q. What did you say to Dr. Howard, or what did you give him, if anything? A. I served the petition, and the writ attached.

"Q. Who else was there? A. Some young woman, acting as an office girl, or typewriter, or something, or bookkeeper.

"Q. Do you know her name? A. I heard Dr. Howard call it. It seems to me, 'Rose,' 'Miss Rose,' referred to her as 'Miss Rose.'

"Q. Miss Rose McAllen? A. I don't believe I heard him say 'Miss McAllen,' but 'Miss Rose.'

"Q. Did you give Dr. Howard a copy of this summons and the petition? A. I did.

Q. What, if anything, did he say when you gave it to him?

"Mr. Scarritt: We object on behalf of Dr. Tiffany, as secondary evidence, as hearsay, and not as tending to sustain any of the issues raised by the pleadings, and irrelevant and immaterial.

"The Court: The objection, so far as Dr. Tiffany is concerned, will be sustained.

"To which ruling of the court the plaintiff at the time excepted and still excepts.

"Mr. Scarritt: We make the same objection on behalf of the defendant, Dr. Howard.

"The Court: Objection overruled.

"To which ruling of the court the defendant at the time excepted and still excepts.

"A. He didn't say anything to me.

"Q. Did he say anything to anybody else? A. Not at that time. After we started to go downstairs he, the doctor, either called the young lady or spoke—

"Mr. Scarritt (interrupting): Same objection to this conversation that is now in process of being made on behalf of Dr. Tiffany, that we made before.

"The Court: The same ruling as before.

"To which ruling of the court the plaintiff at the time excepted and still excepts.

"Mr. Scarritt: We make the same objection on behalf of the defendant, Dr. Howard.

"The Court: Same ruling as before as to Dr. Howard.

"To which action and ruling of the court the defendant at the time excepted and still excepts.

"A. (Continuing) After we started downstairs, he either called to her up the stairway or through a speaking tube, and asked her if she had any record of the Mary Coffey case, and—shall I go ahead?

"Q. What did she say to him?

"Mr. Scarritt: We object on behalf of the defendant, Dr. Tiffany, as being secondary evidence, and a declaration not made by the defendants' or either of them, or by anyone having any personal knowledge of the transaction referred to; it calls for a statement that was impertinent, under the circumstances, and it deserves no notice—that is on behalf of Dr. Tiffany.

"The Court: It may be understood you will renew your objections to all of this testimony, and that I will make the same ruling, without you doing so.

"Mr. Scarritt: This is a fuller objection, it is calling for a different conversation than the former question—that is the reason we make the objection now. It is calling for a statement, as I understand it, through a speaking tube.

"(Question read.)

"The Court: Where was Dr. Howard?

"The Witness: Standing on the steps.

"The Court: Did you see him?

"The Witness: Yes, I was right alongside of him.

"The Court: Did you hear her answer?

"The Witness: Yes.

"The Court: Objection overruled.

"To which ruling of the court the defendants at the time excepted and still except.

"A. He asked her if she had a record of the Mary Coffey case. She said she had; that that was the school teacher that he dropped iodine in her eye and put it out."

It will be noted that the process server was not definite whether the alleged conversation was held by talking to the girl up the stairway or through a speaking tube. The "speaking tube" portion of the facts is omitted by the Court of Appeals and in a close case might be of much importance, but with the view that we have of the disclosed facts in the opinion, it is not so material in the instant case. We have already said we can presume that the court found all the facts in its opinion, and from that finding, as it does not specifically appear that the girl was in the actual presence of Dr. Howard and the process server, we will take it as a fact that she was not. The facts found show the girl to have been in the office, and they do not show her to have changed positions after the service of process and this alleged conversation. By the facts found, the girl being in the office and the alleged conversation being on the stairway, the girl could not well have been in the actual presence of either Dr. Howard or the process server. Of course, the actual testimony of the witness makes this point clearer. This testimony, however, we have cited for illustration rather than use.

We start then with the proposition that it does not appear from the facts found in the opinion that the girl, who made the statement sought to be fastened upon Dr. Howard, as an admission, was in the actual presence of either Dr. Howard or the process server, Wofford, at the time. This is material in measuring the duty of Dr. Howard as to a denial of this voluntary statement of the girl. The question asked by Dr. Howard did not call for such an answer, and hence we say that the statement charged to the girl (and denied by her) was purely voluntary, and in no way called for by the question. Dr. Howard only asked if the girl in Tiffany's office had a record of the case. It should be borne in mind that Dr. Howard was only treating this patient for Dr. Tiffany, in his absence. In other words, that she was Dr. Tiffany's patient and the history of the case had been preserved by Dr. Tiffany's office girl. In other portions of the opinion it appears that this office girl arranged with plaintiff for Dr. Tiffany, as Dr. Tiffany's patient. *Vide* plaintiff's statement of the arrangement made over the telephone as found in the opinion.

Under these facts the questions are (1) was there error in the admission of this testimony as tending to show that Dr. Howard admitted his negligence, and (2) was such ruling violative of previously pronounced doctrines of this court upon like or similar questions? We have no hesitancy in saying that the admission of this evidence was error, nor have we any doubt that its admission contravenes the announced law of this court, as well as other courts. Under the facts and rules of law, Dr. Howard was under no obligations to engage (at long range and with a party out of his sight and presence) in a dispute with the girl over a voluntary statement of hers, and one wholly irresponsible to the question asked. She was not asked what the record would show but merely if she had kept a

record. The Court of Appeals gets mixed upon the matter. They quote from the evidence and say that Dr. Howard asked the girl if she "had a record of the Mary Coffey case." This is the question that the Court of Appeals says he asked and this is borne out by the actual record. In undertaking to reason out a duty upon the part of Dr. Howard to deny this voluntary statement of the girl, that learned court later on says: "The question asked by Dr. Howard called for information kept by her in the course of her employment for the benefit and future use of her employers, and her answer was in direct response to that question."

Here the argument of the court misstates the facts it had previously found, and upon this misstatement of the facts the competency of this evidence is made to turn. Howard at no time asked for the contents of the record and his question in no way called for any such reply.

We do not deny the rule that under given circumstances an admission may be implied from silence, but what we do say is that no court has gone so far as to hold that a man must deny a mere voluntary statement made by a party out of his presence, when to deny it would require him to hurl his denial to a woman out of his presence and in the employ of a co-defendant. And further when he would be required to hurl his denial up a stairway. In *State v. Hamilton*, 55 Mo. l. c. 522, it is said: "It is not in all instances, where declarations are made in the presence and hearing of a person, that those declarations can be given in evidence against him; they frequently call for no reply and sometimes they are impertinent and deserve no notice."

In *State v. Young*, 99 Mo. l. c. 674, one Craft said to Wilson, the marshal having Young, the defendant, in custody, in the presence of Young, "You have got

your right man; you don't have to go any farther to get him." The evidence was held incompetent, and among other things the court said: "The defendant had the right, therefore, to treat the remark of Craft as a mere impertinence and best answered by silence." So in the case at bar. The girl was not in the presence of Howard, and he was in no position to enter into any controversy with her. Her remark was a mere voluntary one, not called for by the question asked, and above all was made by the employee of his co-defendant. It amounted to a charge of criminal negligence, it is true, but because Dr. Howard, situated as he was, chose to treat such a charge, coming from that particular source, with silent contempt, should not permit such remarks to go in as evidence of an admission of guilt.

In *State v. Young*, *supra*, this court has cited with approval the case of *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235. In that case Chief Justice SHAW, with his usual analytical mind, thus states the rule: "If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply, because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to do it by the force of truth; and the declaration, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: First, whether he hears and understands the statement, and comprehends its bearing; and, secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and

whether the statement is made under any circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. *So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by silence; then no inference of assent can be drawn from that silence."*

This approved rule by this court contains several ideas of importance here. It shows that a person is not always called upon to speak. First, if the party making the statement is a stranger, he is not called upon to reply. The word stranger as here used has reference to a party other than a party to the suit or controversy. There is also the further idea that the party need not act if he thinks his security will be best subserved by silence. In other words, the question of whether a person is called upon to make a reply is wholly dependent upon the circumstances, and we reiterate that neither this court, nor any other court, has ever held that it was required of a person charged with an act to answer a voluntary statement of the employee of a co-defendant, when such employee was not even in the presence of the party, and when to reply he would have to hurl his reply up a stairway to a woman in the office of a co-defendant, whose interest might be diverse to him.

In State v. Glahn, 97 Mo. l. c. 694, it is said: "The statement of the witness Lon Wheeler that he thought the man could be found in the field who committed the murder, should be excluded. It is true this statement was made in the presence of defendant,

but it was not such a statement as called for action or reply on the part of defendant. Silence did not therefore amount to an admission. [1 Greenl. Ev., sec. 197.]” We cite this because it approves the rule stated in an older volume of Greenleaf on Evidence. It approves that rule, and makes it the rule of this court.

Section 197 of volume 1 (14 Edition) of Greenleaf on Evidence, so far as material, reads: “*Silence and acquiescence*. Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from this passiveness or silence. (b) The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but also as would properly and naturally call for some action or reply, from men similarly situated.”

This rule emphasizes the matter of the circumstances of the alleged statement. This is one of the crucial questions in this case—were there circumstances such as to call for a reply? We have outlined and the Court of Appeals have outlined them. The Court of Appeals wholly disregarded this rule as to the surrounding circumstances, when they held that Dr. Howard had to herald up a stairway a reply to a voluntary statement made by the employee of a co-defendant, and especially the rule which allows such a person to consider his own personal security in refusing to make a reply.

In one of plaintiff's briefs in the case, it is stated that Dr. Howard stated in evidence that he used *dionin*

in plaintiff's eye, and that *dionin* would produce congestion. If the girl did answer down the stairway, it may have been that Dr. Howard understood her to say *dionin* and not *iodine*, as the process server claims to have understood it. We mention this only as a circumstance in the case, which circumstances should be considered with others before a court should permit such evidence to stand as tending to show an admission of negligence. The opinion shows that the very record book of which Dr. Howard made inquiry was put in evidence, and that it corroborated Dr. Howard as to the drugs used.

Our learned brothers of the Court of Appeals failed to follow the rule approved by this court in the cases, *supra*, when they said that this evidence was competent under the circumstances and facts which they have set out in the opinion.

In the very early case of *Phillips v. Towler's Administrators*, 23 Mo. l. c. 403, we recognized the extreme danger in admitting such testimony as was admitted in this case. In that case we said: "The court erred also in allowing the remarks of Robert Towler, made in the presence of the intestate, to go to the jury. They were to the fact that 'the girl had burned plaintiff's stable, and confessed it.' The intestate, it seems, made no reply, and this was received as an admission of the fact on his part, implied from his supposed acquiescence in what was thus said in his hearing. In regard to these admissions inferred from acquiescence in the verbal statements of others, on the maxim, '*Qui tacet consentire videtur*,' it has been most justly remarked, that nothing can be more dangerous than this kind of evidence, and that it ought always to be received with caution, and never admitted at all unless the statements be of that kind that naturally call for contradiction—some assertion made to the party with respect to his rights, which by his silence he acquiesces

in. [Moore v. Smith, 14 S. & R. 392.] *A distinction is taken between declarations made by a party interested and a stranger, and it has been determined, that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third person may not be so* (Child v. Grace, 2 Car. & Payne, 193); and we are also told that the silence of the party, even when the declarations are addressed to himself, is worth very little as evidence, when the party has no means of knowing the truth or falsehood of the statement. [Hayslep v. Gymer, 1 Ad. & El. 162-5.] The allowance of the proof here was palpably wrong."

We have underlined one clause peculiarly applicable. The courts draw the distinction, under the circumstances of the case, as between statements made by parties interested and strangers. If John Jones had a claim against me and in a statement openly said I owed him for certain reasons, and I declined to make any reply, that is one case. But if some third person, having no connection whatever with John Jones, said to me, You owe John Jones for certain reasons, that is another case. Between the two the books generally, and the cases in this State, draw a distinction. It is an impertinence for one not interested to tell me that I am liable to John Jones. Such impertinences require under our rules, no answer. It is likewise just as much of an impertinence for a stranger to the controversy to say to me, You owe John Jones by reason of your negligence. There can be no distinction drawn between the two supposed cases. All considered, there are not less than two and perhaps three expressed rulings of this court set at naught by the ruling of the Court of Appeals in this case. These we have tried to outline, *supra*, thus: (1) the physical situation of the parties did not demand a denial; (2) the relationship

of the girl to the co-defendant, who might have adverse interests, did not demand a denial; (3) the statement, if made (a matter we seriously doubt) was one not called for by the question, and was therefore purely voluntary, and in the highest degree an impertinence; and (4) Dr. Howard, even if in a physical situation, where a protest might seem to be expected, still had the right to consider his own interests in the controversy and for that reason alone decline to reply. All these doctrines are recognized by this court, and all are ignored by the ruling of the Court of Appeals in this case.

Thus, in the very recent and most excellent work, 1 R. C. L. p. 478, it is said: "Intimately connected with admissions that are implied by the acts or conduct of the party are admissions by silence or acquiescence. If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes no reply, it may be a tacit admission of the facts stated; depending upon whether he hears and understands the statement, and comprehends its bearing, whether the truth of the facts embraced in the statement is within his own knowledge, *whether the circumstances are such as to afford him an opportunity to act and speak freely, and whether the statement is made under such circumstances and by such persons as naturally to call for a reply if he did not intend to admit it.* So, if the matter is of something not within his knowledge, or if the statement is made by a stranger whom he is not called on to notice, or if he is restrained by fear, by doubts of his rights, or by the belief that his security will be best promoted by his silence, then no inference of assent can be drawn from silence."

Bear in mind that "a stranger" as used in all these rules means one not a party to the suit or controversy.

Bear in mind that the circumstances surrounding the parties are material. Bear in mind that he can refuse to reply because he may deem his security to be best subserved by silence. In either of such instances no inference of assent can be drawn from a failure to reply. The case at bar is stronger. The physical situation of the girl and Dr. Howard was not such as to call for a reply. The voluntary statement would justify silence upon the ground of self-security. The relationship of the girl to a co-defendant with apparent adverse interests would prompt silence. These doctrines of law are recognized by the rulings of this court, as we have pointed out. They were ignored by our learned brothers of the bench. It requires no "grey mule" case. It is only necessary for us to find that the general doctrines of law or equity as announced by this court upon similar questions have been contravened.

In fact, under the weight of general authority evidence of this character is considered to be so weak in probative force that it is rarely ever admitted. The circumstances must point very clearly to the necessity for reply, before it can be admitted at all. The books look upon it (admission by his silence) as the weakest of all evidence in probative force, but yet as most dangerous to a defendant in the trial. That the verdict in this case could not have been obtained without this prejudicial evidence, I have little doubt. That the unlettered (scientifically speaking) process server misunderstood *iodine* for *dionin*, I have little doubt, if the talk took place at all. All the circumstances of the case point that way. However these last few lines are beside the question, and only serve to show that even strict legal rules may at least sometimes work out righteous results. For the reasons aforesaid, the judgment of the Court of Appeals should be quashed.

III. It is urged with much force that the facts found fail to show any causal connection between the injury proven, and the acts of the defendants or either of them. There is much substance in the contention, and if we had in the Court of Appeals opinion all of the facts upon the issue, I would feel constrained to discuss it, notwithstanding our ruling in paragraph two, *supra*. That ruling disposes of the judgment of the Court of Appeals, and leaves the case so that such court will have to award a new trial *nisi*, and this, coupled with the further fact that on such new trial further evidence connecting the acts of the defendants with the injury may be introduced, we, personally, prefer not to give expression to our views upon the recited facts in the opinion upon that question. In this case we are confining ourselves to the facts stated in the opinion, although we have read the whole record, and have our own impressions as to the facts therein. Let the record of the Court of Appeals be quashed.

It is so ordered. *Woodson, C. J.*, and *Faris* and *Blair, JJ.*, concur; *Walker, J.*, dissents in opinion filed; *Bond, J.*, dissents, because he thinks this court without jurisdiction; *Revelle, J.*, not sitting.

WALKER, J. (dissenting)—I do not concur in the majority opinion.

The limiting of the review of this case in the majority opinion to an examination of the opinion of the Court of Appeals is in accord with the qualified power granted by *certiorari* to the Supreme Court under the Constitution (Art. VI, sec. 6, Andt. 1884) to supervise the rulings of such courts, and is not subject to objection.

The field of operation of the writ under the power granted by the Constitution is much more limited

than at common law. This court would have no power to quash a judgment of a Court of Appeals on account of its nonconformity with our last previous ruling, if it were not for the constitutional provision which authorizes a review only under the conditions therein prescribed. The sole source of the Supreme Court's power in this regard being in the provision of the Constitution referred to and the same relating only in any given case to the judgment of the particular court of appeals, we must look to the opinion of said court upon which the judgment is based and which of necessity contains the rulings and the reasons for the rendition of the judgment to determine whether cause exists for the issuance of the writ. To extend our examination further would be to question the integrity of the judgment of the Court of Appeals, the appellate jurisdiction of which, except as to the question of excess, is complete in the class of cases to which the one under review belongs. More than this, it would constitute an usurpation of appellate jurisdiction by the Supreme Court properly belonging to the courts of appeals and render them intermediate courts of review, instead of tribunals of final jurisdiction within the meaning of the Constitution. As we have indicated, the review in the case at bar in the majority opinion, being confined to proper constitutional limits, other matters may appropriately engross our attention.

It is urged that the office attendant was not personally present when she made the damaging statement to Dr. Howard in response to his inquiry to which he made no reply; that she was not his employee, but that of his co-defendant, Dr. Tiffany; that her statement was not in response to Dr. Howard's inquiry, and hence was a mere impertinence and that he was not called upon to reply thereto. In view of all of which it is held that the ruling of the Court of Appeals in approving the admission of testimony in

regard to this matter was error and authorizes a review by this court of the opinion of said court, provided, of course, its opinion is not in accord with the last previous ruling of this court on the subject.

Visual and immediate physical presence is not necessary to authorize the application of the ruling which renders testimony in regard to a damaging statement competent and construes silence, under a proper statement of facts, to be an admission of the truth of such statement.

So far as the matter of personal presence is concerned, proximity within a distance sufficient to permit the hearing and understanding of what is said is all that is required. The person making the statement, therefore, should be so situated that the one in whose hearing it was made and whose duty it may be to reply to same may be enabled to hear and understand the statement and thus comprehend its meaning. It is not contended that Dr. Howard did not hear and understand the statement. If this fact were not conceded the circumstances would justify no other conclusion. He made the inquiry in regard to the case he had treated and of which she had kept the record. She heard and understood him, because she replied thereto, designating the patient. That he heard and understood her is evident from the testimony of the deputy sheriff who was in his immediate presence when the reply was made, and who not only heard but comprehended what she said. In the face of these facts, what did it matter whether the attendant was within the sight and touch of Dr. Howard when she made the statement or in Dr. Tiffany's office in another room?

The cases may be examined in vain for an authority holding that a damaging statement of the character here under consideration is not admissible because not made in the immediate presence of one

whose duty it may have been to deny the same. This is true because, as we have stated, hearing and understanding are the tests of admissibility and not mere proximity.

The fact that the office assistant was not an employee of Dr. Howard, but of his co-defendant, is urged in the majority opinion as a reason why he was not required to deny her statement. The rule regulating the admission of evidence of the character here under consideration does not in reason, and should not, require that the person making the damaging statement shall bear any relation to the person whose duty it may have been to deny the statement, to avoid the implication which the law permits that silence indicates acquiescence. The test of admissibility is not the relation of the parties, although this may and often does afford opportunities for an understanding of the matter not otherwise obtainable; but did the person making the statement, irrespective of any relation, have such a knowledge of the subject as to enable him or her to speak understandingly in regard thereto? Let it be conceded that the office assistant was the employee of Dr. Tiffany. Dr. Howard, on account of his professional relation, must have had a general knowledge of the case concerning which he made the inquiry. She must have had a particular knowledge of same, on account of her custody and keeping of the records of the office. Her knowledge and understanding of the matter, therefore, could in nowise have been different or more complete had she been in his employ instead of that of Dr. Tiffany. In addition, the inquiry made by Dr. Howard is, in itself, proof of her possession of such information in regard to the case as to render testimony concerning the statement, as preliminary to showing his silence, clearly admissible. If she did not possess this knowledge, for what purpose was the inquiry made, espe-

cially in view of the Doctor's general knowledge of same and his connection therewith?

The specific inquiry which evoked the statement around which this controversy centers was made by Dr. Howard to the office assistant in his asking her "if she had the record in the Mary Coffey case." She replied "that she had and that the patient was the school teacher that he had dropped iodine in her eye and put it out." It is announced in the majority opinion that this reply was not responsive to the inquiry and hence it was not incumbent on the Doctor to deny same.

A statement may be irresponsible so far as it relates to the inquiry which prompted it, but this does not measure the duty as to the denial of same by one whose rights are thereby affected and whose silence may import an admission as to the truth of the statement. The measure of duty demanding a denial depends upon whether the rights of the person concerning whom the statement is made is affected thereby. If such statement is adverse and is made by one who is enabled from knowledge of the facts to speak understandingly, then a denial is incumbent upon the person referred to.

Here the statement was not made by a stranger, but by one who, on account of her relations, was familiar with the case. The statement had reference to a matter with which the Doctor was also familiar, otherwise he would not have made inquiry for further informaton in regard to same. In addition, and of prime importance in determining whether or not the statement may be regarded as an impertinence, it is evident that it had reference to the Doctor's rights and if unchallenged could not be construed otherwise than as adverse to his interest. His duty, therefore, to deny same was plain.

The Court of Appeals pertinently says in regard to this phase of the case:

"Had the charge come from an impertinent stranger, no admission of its truth could be implied from the silence of the accused. It did not come as an impertinence, but in answer to a question asked by the accused of the young woman who was a sort of *factotum* in the office of defendants, received their patients, inquired into their business and kept the office record of cases treated by defendants. The question asked by Dr. Howard called for information kept by her in the course of her employment for the benefit and future use of her employers, and her answer was in direct response to that question. It purported to give him the facts relating to the history of the case as she had received them from him, and it would have been most unnatural for him not to deny such a charge if it were false, no matter who was present. It was just as though she had said: 'You told me you put out the woman's eye and that is the history of the case in this office.' A charge of that kind, if false, would bring a denial from any man under any circumstances. The evidence was properly admitted."

In *Commonwealth v. Kenney*, 12 Metc. (Mass.) 237, it is announced that where a damaging declaration is made in one's hearing and he makes no reply, his silence may be held to be a tacit admission of the truth of the declaration under these conditions: that he heard and understood the declaration and comprehended its meaning; that the truth embraced therein was within his knowledge; that he was at liberty to make a reply; that the declaration was made under such circumstances and by such a person as to demand a reply, if he did not intend to admit it.

We realize that we are not required to go beyond our own cases to determine the admissibility of testimony in a case submitted for our determination, as is the one at bar. But to avoid citations to numerous authorities we have found it most convenient to em-

ploy the summary found in the Massachusetts case, as embodying all the essentials of our own rulings. In no other case have we found a clearer or more concise statement of the conditions which must be present to authorize the admission of testimony in regard to a statement demanding a denial. A comparison with the facts in the case at bar discloses the presence of all the conditions declared to be necessary in the case cited.

The following cases are either discussed in the majority opinion or are cited by the petitioners for the writ herein as in conflict with the rulings of the Court of Appeals in the admission of this testimony: *State v. Hamilton*, 55 Mo. 520; *Phillips v. Towler's Admr.*, 23 Mo. 401; *State v. Young*, 99 Mo. 666; *Adams v. Railway*, 74 Mo. 553; *Wojtylak v. Coal Co.*, 188 Mo. 260; *Shake v. Mullins*, 101 Mo. 517; *State v. Glahn*, 97 Mo. 679. We will review them in their order to enable it to be determined, from a fair statement of the facts in each, whether they contravene the ruling under review.

In *State v. Hamilton*, *supra*, the remarks received in evidence were not, as in the instant case, directed to the defendant, and hence did not charge him with any offense. The *Hamilton* case is referred to and distinguished by the Court of Appeals as presenting a different state of facts from those in the case at bar.

In *Phillips v. Towler's Admr.*, *supra*, a remark was made in the presence of the owner of a slave that the slave had burned the building in controversy and had confessed, to which the owner made no response. It was not shown that the owner had any personal knowledge of the transaction and, of course, the remark made no charge against him. His silence under these circumstances, being the silence of one not personally accused, could in no sense be held to be an acquiescence in the truth of the statement.

In *State v. Young*, *supra*, the remark charged to have been made in the presence of the accused was made while the latter was under arrest and therefore in no position to make a denial. Further than this, the remark was made by a mere stranger, who is not shown to have had any knowledge of the case, and while made in the presence of the accused, it was not addressed to him and was therefore no more than an impertinence which did not require a denial.

Adams v. Railroad, *supra*, instead of containing a ruling adverse to that of the Court of Appeals, is an authority in support of same. The *Adams* case holds that the declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of the inquiry in the suit in which they are offered. The office attendant, in the case in controversy, was engaged in the transaction of Dr. Howard's business and was therefore his agent when she was asked by him if she had the record in the Coffey case, and her reply was made in response to this inquiry; that the inquiry was a part of the entire transaction is evident from the fact that the deputy sheriff had just served a summons upon Dr. Howard in the suit brought by the plaintiff for the injury about which the inquiry was made.

In *Wojtylak v. Coal Co.*, *supra*, there is no ruling which by remote inference can be said to sustain the petitioners' contention.

In *State v. Mullins*, *supra*, the declaration charged to have been made was in a judicial proceeding and hence not within the rule.

In *State v. Glahn*, *supra*, it is held that the rule in regard to admissions inferred from acquiescence in the verbal statements of others has no application except when the statement calls for action or reply on the part of the defendant. With this statement of the rule

we have no fault to find, but we question the propriety of its application to the facts at bar, except to sustain the ruling of the Court of Appeals. If there ever was a case calling for action or reply it was in the one now under consideration. Dr. Howard was familiar with all the facts, he had been the principal actor in the case, he knew from the service of the summons then made by the officer that the plaintiff had asserted in a court of law her right to damages for the injuries he was alleged to have inflicted; when, therefore, the declaration as to his liability was made by the attendant that he had dropped iodine in the eye of the school teacher (meaning plaintiff) and put it out, his duty, to avoid the application of the rule as to the inference the law permits to be drawn under such circumstances, became imperative to deny the truth of the declaration.

The decision of the Court of Appeals admitting the testimony in question did not contravene any previous ruling of this court on the subject. More than this, it is in accord with the strong current of authority elsewhere. There is, therefore, no authority for the exercise of our supervisory power. [2 Wigmore on Ev., sec. 1071; 2 Mod. Ev., Chamberlayne, secs. 1418-1433; 2 Jones Com. on Ev., sec. 289; and Wigmore on Ev., sec. 1071, containing reference to latest cases.]

In view of the reasons stated and the conclusions flowing therefrom, it follows that our writ should be quashed, which will result in an affirmance of the judgment of the Court of Appeals.

FRANK MANIACI, Appellant, v. INTERURBAN
EXPRESS COMPANY.

In Banc, February 9, 1916.

CORPORATION: Liability for Malicious Assault by Agent Upon Patron. A corporation, an express company and a common carrier, which had delivered a consignment of fruit to plaintiff, who, after refusing on account of a shortage in the shipment to sign a receipt therefor until the company's agent would present his claim for an allowance for the shortage, returned at the agent's request, given by telephone, to defendant's office for the purpose of discussing a settlement of the matter, and when near the office was met by said agent, who demanded that plaintiff then and there sign said receipt, and when plaintiff under protest was in the act of signing it, suddenly drew a pistol and without warning shot plaintiff, is liable in civil damages, both actual and punitive, to plaintiff for the injuries resulting from said assault; and a second count in the petition in which knowledge by defendant of the agent's violent temper, quarrelsome disposition and unfitness for his position, in addition to such other facts, is charged, also states a cause of action.

Held, by WOODSON, C. J., dissenting, with whom BLAIR, J., concurs, that the agent's act was a crime, personal to himself, in no way within the scope of his agency, and could not be authorized by the company, because unlawful, and being wholly unauthorized and unauthorizable, the company is not liable in civil damages for the injuries to plaintiff caused by his murderous assault.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

REVERSED AND REMANDED (*with directions*).

George H. Moore and *Frank A. Thompson* for appellant.

(1) The master is liable even for the wanton and malicious acts of the servant if done in the scope of his employment. 2 Mechem on Agency (2 Ed.),

1522; Richberger v. Express Co., 73 Miss. 161, 31 L. R. A. 390; 6 LaBatt's Master & Servant (2 Ed.), sec. 2239a; Chicago Ry. Co. v. McMahon, 103 Ill. 485; Haehl v. Railroad, 119 Mo. 325; Bouillon v. Gas Light Co., 148 Mo. App. 462; Express Co. v. Sobel, 125 S. W. (Tex.) 925; Railroad v. Hack, 66 Ill. 238; Amusement Co. v. Martin, 62 So. (Ala.) 404; Bergman v. Hendrickson, 106 Wis. 434; Fishing Club v. Stewart, 9 L. R. A. (N. S.) 475. (2) It is an act of negligence upon the part of the principal to employ as an agent and place in charge of his premises or business one whom he knows or by the exercise of reasonable care should know to be a person of violent passions and ungovernable temper and a dangerous man. Dean v. Depot Co., 41 Minn. 360, 5 L. R. A. 442; 6 LaBatt's Master & Servant, 6676; Wanstall v. Pooley, 6 Cl. & F. (Q. B.) 910; Christian v. Railroad, 79 Ga. 460; Railroad v. Hackett, 58 Ark. 381, 41 Am. St. 105; Carson v. Canning, 180 Mass. 461; Railroad v. Day, 34 L. R. A. 111; Richberger v. Am. Ex. Co., 73 Miss. 161, 31 L. R. A. 490; Express Co. v. Sobel, 125 S. W. (Tex.) 925. (3) Public service companies who invite the public to become their patrons owe a duty to such members of the public as accept their invitation to protect them from misconduct on the part of the servants and employees of said companies. The tendency of the most recent decisions is to hold the master to a stricter rule of liability rather upon the ground of a special duty toward the injured party being violated than upon the principle of *respondeat superior*. 6 Labatt's Master & Servant (2 Ed.), 6878; Dickson v. Waldron, 24 L. R. A. 483; 1 Jaggard on Torts, 263; Mallach v. Ridley, 9 N. Y. Supp. 922; Amusement Co. v. Martin, 62 So. 404; Swinarton v. Le Boutillier, 7 Misc. N. Y. 639, 148 N. Y. 752; Express Co. v. Sobel, 125 S. W. 925; Richberger v. Express Co., 73 Miss. 161, 31 L. R. A. 390; Dean v. Depot Co., 41 Minn. 360, 5 L. R. A. 442.

H. R. Small for respondent; *Fred Tecklenberg* of counsel.

(1) While a demurrer admits as true all material facts which are well pleaded in the petition, it does not admit conclusions of law. Pattison's Code Pleading (2 Ed.), secs. 925, 926. (2) The allegation of the amended petition that the servant was, in shooting plaintiff, acting "within the scope of his employment" is an allegation of a legal conclusion. *Snyder v. Railroad*, 60 Mo. 413; *Pattison's Code Pleadings* (2 Ed.), sec. 435; *Johannson v. Fuel Co.*, 72 Minn. 409. (3) The master, while now held liable civilly to third persons for the servant's intentional wrongs committed "within the scope of the servant's employment" is not liable for the servant's intentional wrongs committed outside the scope of the servant's employment. 6 *Labatt, Master and Servant*, sec. 2244; *Whiteaker v. Railroad*, 252 Mo. 438. (4) An assault on a debtor by a servant employed to collect debts is outside the scope of his employment. *Collette v. Rebori*, 107 Mo. App. 711; *Milton v. Railroad*, 193 Mo. 58. (5) Shooting is ordinarily outside the scope of a servant's employment and is only in exceptional cases within it. *Mechem on Agency* (2 Ed., 1914), sec. 1979; 26 *Cyc.* 1541. (6) The petition does not state a cause of action because (while it states facts that would make the servant liable) it states no facts which justify holding defendant as master liable for the shooting. On the contrary, the shooting under the facts alleged is shown plainly to be outside the scope of any employment or employment duty stated in the petition. The only duties at all inferable even from the petition are those incident to the employment of one in charge of an office and the duty to secure a receipt for goods previously delivered by defendant to plaintiff. It was not within the scope of such employment or employment duties to suddenly, without warning, without just cause or pro-

vocation, wilfully, wantonly, maliciously and unlawfully shoot plaintiff twice. Snyder v. Railroad, 60 Mo. 413; Whiteaker v. Railroad, 252 Mo. 457; Collett v. Rebori, 107 Mo. App. 711; Bowen v. Railroad, 136 Fed. 306, 70 L. R. A. 915; Milton v. Railroad, 193 Mo. 58. (7) The wrong perpetrated must be shown to pertain to the particular duty of the servant to make the master liable. Farber v. Railroad, 116 Mo. 94. (8) The act of shooting under the allegations of the petition cannot "fairly be regarded as a natural incident to, a direct outgrowth of, a natural ingredient in the execution of the service which the master confided to the servant" in the case at bar. Mechem on Agency (2 Ed.), sec. 1962. (9) From appellant's second point it appears that by the second count and by the additional matter contained in the second count appellant now asserts he charged defendant with negligence in employing the agent and keeping him in charge of its office. If this be true, asserting negligence and intentional wrong in the second count renders it a *felo de se*. If the act was careless or negligent, it was not wilful, and *vice versa*. Raming v. Metropolitan Street Railway Co., 157 Mo. 507. But it appears plaintiff did not charge defendant with negligence, but simply alleged knowledge of the servant's propensities in order to aggravate, increase and to justify punitive damages on account of the wilful wrong of the servant. (10) Missouri law and the weight of authority is against the contention made in appellant's third point. 6 LaBatt, Master and Servant, sec. 2244; Mechem on Agency (2 Ed.), secs. 1963-1969; Collette v. Rebori, 107 Mo. App. 711; Bowen v. Railroad, 136 Fed. 306.

RAILEY, C.—This action was commenced in the circuit court of the city of St. Louis on March 16, 1912; and afterwards on the 18th day of October, 1912, and

during the October term of said court, an amended petition in two counts was filed in said cause, which, without caption and signatures, reads as follows:

“Plaintiff states that defendant is and was at all times hereinafter mentioned a corporation duly incorporated under the laws of the State of Illinois and doing business in the State of Missouri; that on and about the first day of February, 1911, defendant was engaged in and carrying on an express business as a common carrier of freight; that defendant had and maintained an office in the city of Edwardsville, Illinois; that said office was in charge of one Harry Joiner, who was the agent and servant of defendant; that defendant was at said time a merchant in said city of Edwardsville; that several days previous to the said first day of February, 1911, defendant in its capacity as a common carrier delivered to plaintiff a consignment of fruit, and that plaintiff refused to sign a receipt for same until the said Harry Joiner, the agent and servant of defendant, had agreed to present plaintiff's claim for an allowance for a shortage in the consignment; that upon the said first day of February, 1911, the said Harry Joiner, defendant's agent and servant, telephoned to plaintiff to come to the office of defendant for the purpose of discussing a settlement of the matter; and in response to said message plaintiff started to defendant's office as requested by defendant's servant; that near the office plaintiff met defendant's servant, the said Joiner, who demanded that plaintiff then and there sign a receipt for the said consignment of fruit; that plaintiff under protest started to comply with said demand and was in the very act of signing the receipt when the said Harry Joiner, being at the time the employee, agent and servant of the defendant company and acting within the scope of his employment as such agent and servant, did suddenly and without warning draw a pistol and without just cause

or provocation wantonly, maliciously and unlawfully shoot plaintiff twice, wounding him in the breast and shoulder.

“Plaintiff states that as a direct result of said injuries and assaults he suffered great bodily and mental pain and was confined to a hospital by reason thereof for a long period of time, to-wit, for the period of about one month, and thereafter was confined at his home to his bed and room for the period of about one month; that by reason of said injuries he was disabled and prevented from attending to his business and affairs for the space of about seven months; that he has suffered and will continue to suffer great bodily pain, annoyance, inconvenience and expense; that as a direct result of said injuries and assault he was compelled to procure and did procure necessary medical attention and treatment, which were then necessary, and still are, and will continue to be necessary for an indefinite period, and that on account of said services alone he has been put to the expense of about the sum of three hundred dollars.

“Plaintiff states that by virtue of the premises, he has been injured and damaged in body, mind, health, pain and suffering and loss of time and necessary expenses in the sum of ten thousand dollars actual damages and ten thousand dollars punitive damages, for both of which amounts, together with the costs in this behalf expended, plaintiff prays judgment.

“2.

“For a second cause of action, plaintiff states that defendant is and was at all times hereinafter mentioned a corporation duly incorporated under the laws of the State of Illinois and doing business in the State of Missouri; that defendant on or about the first day of February, 1911, was engaged in the express business and was acting as a common carrier of

freight; that for the purposes of its business it maintained an office in the city of Edwardsville, Illinois; that defendant had as an agent and servant in charge and control of said office one Harry Joiner; that said Harry Joiner was a person of violent temper, quarrelsome disposition and without control over his passions; that said Harry Joiner was a dangerous and unfit person to place in such a position; that said Joiner's dangerous and unfit character and disposition were well known to defendant; that on and previous to said first day of February, 1911, plaintiff was engaged in business in the city of Edwardsville, Illinois; that a dispute having arisen between plaintiff and defendant's servant and said Joiner, because plaintiff refused to sign a receipt of a consignment of fruit delivered to him by the defendant, that said Harry Joiner upon February first, 1911, telephoned to plaintiff to come to the office of defendant in the city of Edwardsville; plaintiff, in response to said request, started to said office and when near there was intercepted by said Joiner, who demanded that plaintiff immediately sign a receipt for the said consignment of fruit; that plaintiff, under protest, started to sign said receipt, and while he was so engaged, the said Joiner, the agent and servant of said defendant, acting within the scope of his employment as such agent and servant, did suddenly and without warning give way to a fit of passion and draw a pistol and without just cause or provocation wantonly, wilfully, maliciously and unlawfully shoot plaintiff twice, wounding him in and about the left breast and left shoulder.

"Plaintiff states that as a direct result of said injuries and assault he suffered great bodily and mental pain and was confined to a hospital by reason thereof for a long period of time, to-wit, for the period of about one month, and thereafter was confined at his home to his bed and room for the period of about one

month; that by reason of said injuries he was disabled and prevented from attending to his business and affairs for the space of about seven months; that he suffered and will continue to suffer great bodily pain, annoyance, inconvenience and expense; that as a direct result of said injuries and assault he was compelled to procure and did procure necessary medical attention and service and treatment, which were then necessary and still are and will continue to be necessary for an indefinite period, and that on account of said services alone he has been put to the expense of about the sum of three hundred dollars.

"Plaintiff states that by virtue of the premises he has been injured and damaged in body, mind, health, pain and suffering and loss of time and necessary expenses in the sum of ten thousand dollars actual damages and ten thousand dollars punitive damages, for both of which amounts, together with the costs in this behalf expended, plaintiff prays judgment."

On October 21, 1912, respondent filed a demurrer to each count of said amended petition, which said demurrer without caption and signature, reads as follows:

"1. Now comes defendant and demurs to the first count of the plaintiff's amended petition on the ground that said count of said amended petition does not state facts sufficient to constitute a cause of action.

"2. And defendant comes and demurs to the second count of plaintiff's amended petition on the ground that said count of the said amended petition does not state facts sufficient to constitute a cause of action."

At the December term, 1912, and on January 3, 1913, of said term, demurrer aforesaid was sustained. On January 31, 1913, during said term, plaintiff declined to plead further and final judgment was rendered on said date, and the cause was duly appealed to this court.

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I. Does the first count of the amended petition contain facts, sufficient at law, to constitute a cause of action against defendant?

Turning to the amended petition, and analyzing same, we find that in substance it alleges the following

Liability of
Corporation for
Murderous
Assault of
Agent.

facts: (1) That defendant is a corporation, organized under the laws of Illinois, and doing business in the State of Missouri; (2) that on or about February 1, 1911, defendant was engaged in the express business as a common carrier of freight; (3) that it had and maintained an office in the city of Edwardsville, Illinois; (4) that said office was in charge of one Harry Joiner, *who was at the time agent and servant of defendant*; (5) that defendant was at said time a merchant in said city of Edwardsville; (6) that several days prior to February 1, 1911, defendant in its capacity as a common carrier, delivered to plaintiff a consignment of fruit, and the latter refused to sign a receipt therefor, until said Harry Joiner the agent and servant of defendant aforesaid, had agreed to present plaintiff's claim for a shortage allowance in the consignment; (7) that upon said first day of February, 1911, *said Harry Joiner, defendant's agent and servant, telephoned plaintiff to come to the office of defendant for the purpose of discussing a settlement of the matter*; (8) *that in response to said message plaintiff started to defendant's office as requested by defendant's servant*; (9) *that near the office plaintiff met defendant's servant, the said Joiner, who demanded that plaintiff then and there sign a receipt for the said consignment of fruit*; (10) that plaintiff under protest started to comply with said demand and was in the very act of signing the receipt, when said Harry Joiner, being at the time an em-

ployee, agent and servant of defendant, and acting within the scope of his employment as such agent and servant, did suddenly and without warning draw a pistol, and without just cause or provocation, wantonly, maliciously and unlawfully shoot plaintiff twice, wounding him in the breast and shoulder, etc.

A demurrer to each count of said petition was sustained by the trial court, upon the theory, that neither count states facts sufficient to constitute a cause of action.

Defendant strenuously insists that the words, "within the scope of his employment," is an allegation of a legal conclusion. The above language taken *alone*, without any reference to that which precedes or follows it, would state simply a legal conclusion, and the truth of same would not be admitted by a demurrer thereto. [State ex rel. v. Railroad, 240 Mo. 35, l. c. 49-50; Gibson v. Railroad, 225 Mo. 473, 482; Shohoney v. Railroad, 223 Mo. 649, 671; Mallinckrodt Chemical Works v. Nemnich, 169 Mo. l. c. 397; Sidway v. Land & L. S. Co., 163 Mo. l. c. 374-5; Clark v. Dillon, 97 N. Y. 370; Snyder v. Railroad, 60 Mo. l. c. 419; Southern Ry. Co. v. King, 217 U. S. l. c. 536-7; General Electric Co. v. El. & Mfg. Co., 144 Fed. 458; Railroad v. Lightheiser, 163 Ind. 247; Fremont, E. & M. V. R. Co. v. Hagblad, 72 Neb. 773; Kennedy v. Street Ry. Co., 72 N. J. L. 19; Bullock v. Butler Exchange Co., 22 R. I. 105.] Numerous other cases can be found in practically every State of our Union announcing the same principle, *but we have been unable to locate any case, which would warrant the court, in passing upon the above question, to ignore the well pleaded facts upon which the conclusion of law was based.* In other words, if the facts stated, aside from the language above quoted, are sufficient to stamp the acts and conduct of Joiner, at the time and place of shooting, as being within the scope of his employment, then the petition states a

good cause of action, even if the language "*within the scope of his employment*" be eliminated therefrom. Cases of this character present a mixed question of law and fact. It is a common, but an appropriate form of pleading, in cases like the one at bar, to set out the facts constituting the cause of action, and follow the same with the allegation that the agent at the time of the assault was acting within the scope of his employment. The demurrer goes to the count as a *whole*, and should not be determined upon isolated and disconnected portions of the petition.

As said in Snyder v. Railroad, 60 Mo. l. c. 419, cited and relied upon by defendant: "The *facts* being conceded, whether a given act is within the scope of a servant's employment is a question of law for the court."

It appears from the petition that defendant was a corporation, a merchant, and likewise engaged in carrying on an express business, in the town aforesaid, as a common carrier of freight. It is also averred that defendant maintained an office in Edwardsville, Illinois, and that said Harry Joiner was the agent and servant of defendant, in charge of said office.

It appears from the petition that defendant as a common carrier, had delivered to plaintiff a consignment of fruit, and on account of the shortage of same plaintiff declined to receipt for said fruit unless Joiner, the agent, would present plaintiff's claim for an allowance on account of said shortage. While matters were in this shape, the agent, Joiner, called up plaintiff by telephone, and requested him to come to defendant's office for the purpose of discussing a settlement of the matter. In response to said message, plaintiff started to defendant's office as requested, and when near the office plaintiff met Joiner. The latter *demand*ed that plaintiff *then* and *there* sign a receipt for the said consignment of fruit. Up to and including above, Harry Joiner was the unquestioned

agent of defendant, and was acting within the scope of his employment in endeavoring to obtain from plaintiff a receipt for said consignment, and a settlement of the controversy in respect to said shortage. It is insisted, however, by respondent, that Joiner was not acting within the scope of his employment when he *shot* plaintiff at the time and place mentioned in the complaint. The petition, however, alleges, that plaintiff, *under protest*, started to comply with Joiner's demand and was in the *very act* of signing the receipt when Joiner, being at the time the agent of defendant, and acting within the scope of his employment, as such agent, did suddenly and without warning draw a pistol, and without just cause or provocation wantonly, maliciously and unlawfully shoot plaintiff, etc.

Joiner was there at the time and place of shooting as the *vice-principal* of defendant. The plaintiff was there upon the *invitation* of defendant for a *legitimate* purpose. He and Joiner were in the midst of the very business which had called them together, at the time said shooting occurred. In addition thereto, the petition alleges that plaintiff was in the *very act* of signing the receipt when he was suddenly shot, etc.

A large portion of the business of this country is conducted through agents of common carriers; and in a large measure, the public is required to come in contact with these agents in dealing with public service corporations. Upon grounds of public policy, if for no other reason, the *principal* should not be permitted to withdraw from the business and turn the same over to agents who have no regard for the public welfare, and thereby escape responsibility which he would have to bear, if attending to the business in person.

It is not imposing too great a hardship upon either corporations or individuals, to require them to respond in damages to legitimate patrons, for unprovoked, wanton and malicious assaults, inflicted

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upon them, while in the very act of settling their controversies with the agent of the carrier. The conclusion thus reached is fully sustained by the great weight of modern jurisprudence. [Whiteaker v. C. R. I. & P. R. R. Co., 252 Mo. 438; O'Malley v. Construction Co., 255 Mo. l. c. 391-2; Winn v. Railroad, 245 Mo. l. c. 415-6; Haehl v. Railroad, 119 Mo. 325; Perkins v. Railroad, 55 Mo. 201, 214; Garretzen v. Duenckel, 50 Mo. 104; Whimster v. Holmes, 177 Mo. App. 130; 5 Thompson on Corporations (1 Ed.), sec. 6298; Richberger v. Express Co., 73 Miss. 161; Railroad v. Hackett, 58 Ark. l. c. 387; Tillar v. Reynolds, 96 Ark. 358; Skipper v. Clifton Mfg. Co., 58 S. C. 143; Stranahan Co. v. Coit, 55 Ohio St. 398; Carlberg v. House Furnishing Co., 178 Ill. App. 424; Ziegenhein v. Smith, 116 Ill. App. l. c. 82; D. & R. G. Ry. v. Harris, 122 U. S. 597; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 109; Forrester v. So. Pac. Ry. Co., 36 Nev. 247; 2 Cooley on Torts (3 Ed.), secs. 627, 631, 632; Wood's Law of Master & Servant (2 Ed.), secs. 307-309; 1 Shearman & Redfield on Negligence (6 Ed., by Street), sec. 146, p. 356; Pierce on Railroads, pp. 277-8; 2 Mechem on Agency (2 Ed.), secs. 1929-1960; 1 Clark & Skyles on Law of Agency, secs. 491, 493, 494, 502; Leavitt's Law of Negligence, pp. 527-8; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31; Ryder v. City of La Grande, 73 Ore. 227; Hardeman v. Williams, 169 Ala. 50.] Many other cases are cited in above authorities to same effect. A few quotations will illustrate the trend of the modern rule in dealing with this subject.

Haehl v. Wabash Ry. Co., 119 Mo. 325, has not only become one of the leading cases in this State upon the question under consideration, but has been frequently cited with approval in text books and opinions of other States. In the Haehl case, suit was brought by plaintiff to recover damages, on account of the killing of

her husband, by defendant's watchman in charge of its bridge across the Missouri river at St. Charles, Missouri, in March, 1891. She recovered in the trial court a judgment for \$5000, and it was affirmed by the Supreme Court. The bridge in charge of said watchman was a railroad bridge, and not a public highway for foot passengers. At about eight o'clock in the forenoon of March 17, 1891, deceased was seen crossing above the bridge from the St. Louis county side towards St. Charles on the west. He had gone over the approach on the St. Louis side, the main bridge and a part of the approach on the St. Charles side, when he was met by James W. Hill, defendant's bridge watchman, and his brother. The watchman motioned to him to go back, but the latter failed to do so. Hill went up to him and had some conversation with him, but no witness heard it. "It resulted, however, in the deceased starting back, when Hill struck him on the back or shoulder twice with a club or billy, and the deceased commenced running back towards the St. Louis side, followed by Hill. They thus proceeded until the deceased had recrossed the trestle on the St. Charles side, the whole of the main bridge, and about one-half the approach on the St. Louis side, pursued by Hill, when they two being thus alone on that approach, Hill in the rear of deceased and distant about fifteen feet from and pursuing him, a pistol shot was fired, the ball striking the deceased in the back of the neck a little to the left of the median line and on a line with the base of the ears," producing his death.

With the above facts before it, this court sustained the judgment below, although the jurors in arriving at their verdict were authorized, if they found for plaintiff, to allow both compensatory and exemplary damages.

In the Hachl case, *supra*, the deceased was not lawfully upon the bridge and was retreating when shot.

Here, the plaintiff was not a trespasser, but was transacting his, and the company's business, with the defendant's agent, upon invitation, and while in the very act of complying with the agent's request was shot without warning and without provocation.

In *Richberger v. Express Co.*, 73 Miss. 161, the trial court sustained a remurrer to a petition very similar to the one at bar, and its action in that respect was reversed by the Supreme Court and said petition held to be good. In the above case, plaintiff had been made to pay an overcharge on express matter by the local agent of defendant, and the general agent had been seen and said it would be arranged. Plaintiff saw the local agent about December 25, 1894, but was put off. The petition avers that about the first day of January, 1895, plaintiff went to the office of said express company, upon business with it. Said agent of defendant in charge of the office informed plaintiff that he then and there desired to refund to plaintiff said overcharge, "and then and there paid the same to plaintiff, and required plaintiff to sign a receipt for the same, and when plaintiff signed and delivered said receipt to said agent, the said agent did then and there, immediately upon the reception of said receipt, and while plaintiff was there in the business office of said company, wilfully, wantonly, oppressively and wrongfully curse, abuse, insult and maltreat plaintiff, because plaintiff had demanded and received from said company the overcharge as aforesaid." Judge WHITFIELD, upon pages 171-2, closed his opinion in the case just cited, with a quotation from the very able opinion of Judge ANDREWS of the New York Court of Appeals, in *Rounds v. Railroad*, 64 N. Y. l. c. 134, as follows:

"The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is

justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or *under the influence of passion aroused by the circumstances and the occasion*, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another."

In the well considered case of Otis Elevator Co. v. First Nat. Bank, 163 Cal. 1. c. 39, Judge LORIGAN, speaking for said court, said:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business. [Story on Agency, sec. 452; Shearman & Redfield on Negligence, sec. 65; Civ. Code, sec. 2838.] After declaring this to be the rule, Story says: 'In all such cases the rule applies, *respondeat superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.' "

In Pierce on Railroads, at pages 277-8, the rule is tersely stated as follows:

"The company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred upon them; and when they keep within the course of their employment, it is responsible for their negligence or wrongful act, although they are acting against its instructions, or even wilfully."

In 2 Cooley on Torts (3 Ed.), section 626, page 1017, the greatest of all writers upon this subject, in clear and forceful language, said:

“The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond.”

In 2 Mechem on Agency (2 Ed.), section 1929, the same principle of law is clearly expressed in the following language:

“It is obvious, therefore, that the question of the principal’s or master’s liability cannot always be determined merely by putting a label upon the motive. The motive is important, but it is important not so much for the purpose of determining how the act was done as to aid in deciding whose act it was. Certain it is, at any rate, that the tendency of the modern cases is to attach less importance to the motive with which the act was done, and to give more attention to the question as to whose business was being done and whose general purposes were being promoted.”

The same author, in the same volume, under section 1960, page 1523, sums up the law upon this subject as follows:

“In many cases no better definition can be given than the words themselves suggest. But, in general terms, it may be said that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master’s business and be done, although mistakenly or ill-advisedly, with a view to further the master’s interests, or from some impulse or emotion which naturally grew

out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account."

We deem it unnecessary to quote further from the authorities upon this subject. The rule declared in the *Haehl* case *supra*, is in full accord with the recent utterances of this court, and is sustained by the decided weight of authority. We therefore hold that the first count of the petition states a good cause of action, and that the demurrer thereto was improperly sustained.

II. The second count of the petition sets out in a general way substantially the same facts pleaded in the first count, and in addition thereto attempts to plead *knowledge* upon the part of defendant as to the temper, disposition, character and unfitness of its agent who assaulted plaintiff. While it does not appear from the petition that such knowledge came to defendant, in time by the exercise of ordinary care to have removed said agent before the assault was made, yet the other facts stated in said count, under the authorities heretofore cited, are sufficient to constitute a good cause of action. Hence the demurrer to the second count was improperly sustained.

III. We have reached the conclusion, that each count of the petition states a good cause of action.

We therefore reverse and remand the case as to both counts, with directions to the trial court to set aside the judgment rendered upon each of said counts; to grant the plaintiff a new trial as to each count and that the cause be proceeded with in accordance with the views herein expressed. *Brown, C.*, not sitting.

PER CURIAM.—The foregoing opinion by RAILLEY, C., is adopted as the opinion of the Court in Banc. *Graves and Bond, JJ.*, concur; *Faris and Revelle, JJ.*, concur in result; *Woodson, C. J.*, dissents in separate

opinion, in which *Blair, J.*, concurs; *Walker, J.*, dissents.

WOODSON, C. J. (dissenting).—I dissent from the majority opinion in this case, principally for the reasons stated by me in the dissenting opinion filed in the case of *Whiteaker v. Railroad*, 252 Mo. 438, l. c. 463; also for the reason that it is absurd, to my mind, to say that public service corporations of the country in employing men to conduct their business thereby authorize them to commit murder or other felonies, which constitute no part of the acts performed by them as such agents. No such idea ever enters the minds of the carrier, their employees or any of their customers; consequently, it is a *non sequitur* to say that such an agent or employee as Joiner, in this case, was acting within the scope of his employment when committing the crime with which the petition charges him—one of the most heinous known to God and man. In other words, no such corporation could, by express authority, authorize one of its employees to commit a crime in the performance of his duty to the company, unless he was acting within the scope of his employment. If such authority should be given, it would clearly be *ultra vires*, and not binding on the company; but should the officers of the company direct the agent to commit a crime and he should perpetrate it, then he and they would be *particeps criminis* in its commission, which, in no manner, could or would render the company liable to the injured party in damages; consequently, in order to render the company liable in such a case, the agent must be acting within the scope of his employment, that is, the crime committed must have been a part of or an integral element of the act he performed for the company under its contract with him authorizing him to perform the same; and in such a case it is wholly immaterial whether his authority to commit the crime was given in express terms or im-

plied from the authority to perform the act of which the crime was a part. This is self-evident.

That being true, then let us for a moment briefly consider what services or acts the agent was employed to perform for the defendant. While the petition does not state them in detail, yet in general terms it charges that he was the agent of the company at Edwardsville, Illinois, and that it was his duty to deliver to its patrons all goods transported by it to them at that point, and to take their receipts therefor.

It is also charged that the goods which the company had transported to plaintiff at Edwardsville, had been delivered to him by the agent — days prior to the day upon which the shooting occurred.

From this statement in the petition it is clearly seen that the act of *delivering* the *goods* in no manner caused or contributed to the injury; that service had been fully performed long before the shooting occurred. So this fact will be dismissed without further consideration.

Consequently, if the company is liable to plaintiff, it must be for the reason that it authorized the agent to use violence if necessary toward the plaintiff in the performance of the service of the company in procuring the receipt for the goods delivered to him.

There is no charge in the petition that the defendant had given the agent express authority to commit the assault upon the plaintiff, and, therefore, if the agent possessed that authority, it must be implied from the general authority given by the defendant to all of the agents, the plaintiff included, to take receipts from its patrons for goods transported for and delivered to them. So it is seen that the question has been narrowed down to the single legal proposition, was the crime committed by the agent, a part of, or an integral element of the act of the agent in demanding the receipt of the plaintiff for the goods previously delivered to him?

That question, in my opinion, must be answered in the negative. The authority of the agent to demand and receive the receipt in no manner required the exercise of any force or violence on his part toward the plaintiff, nor is such a thing contemplated by any one in the performance of such a duty; and if procured by violence, the receipt would be worthless for the purpose for which the company wanted it, namely, as evidence of the delivery of the goods. Its procurement by that means would amount to duress or robbery, which would render the receipt illegal and destroy it as evidence of the delivery, the design of the company in demanding it.

Clearly the case of *Haehl v. Wabash Ry. Co.*, 119 Mo. 325, does not support the propositions of law announced by our learned commissioner in this case. In that case the performance of the act of the agent for the defendant, which resulted in the death of Haehl, was authorized by the company, and from the very nature of that act, force or violence was contemplated, if necessary, for its performance. There the agent was a watchman, and among other things he was required to keep trespassers off of defendant's bridge, and while expelling Haehl therefrom the latter was killed by the agent. In discussing that case, the court on page 340, said:

"It is conceded that a part of the business which Hill was employed to perform as watchman, was to keep trespassers off of defendant's bridge; this necessarily involved the duty of putting them off after they got on, if they were found unwilling to go. The evidence tended to show that Hill was engaged in the performance of this duty when he fired the fatal shot; that the business was not done; that it was not taking care of itself, but that the defendant's servant at the time was engaged in it and concerned about it; that he shot *dum ferveat opus*; and so far as evidence discloses, was concerned about, and engaged in, no other business."

In the case at bar, the duty of the agent to demand the receipt from the plaintiff did not involve the duty of using force or violence toward him. Nor does the case of *Whiteaker v. Ry. Co.*, 252 Mo. 438, lend any support to the opinion of the commissioner. In that case it was the duty of the conductor of the train to keep trespassers off of it. There the court held, as in the former case, that the act of expelling persons from the train necessarily implied the authority to expel them therefrom by force, if necessary, and that if more force was used than was necessary to accomplish his ejection, and he was thereby injured, then the company was liable. I dissented from the opinion in the latter case, not because it did not announce correct legal propositions, but for the reason that there was not sufficient evidence upon which to base them, as will appear by the dissenting opinion filed therein.

But in both of those cases, this court clearly recognizes the principles of law I am here contending for. In the first case this court on page 339, said:

“But if his [the master’s] business is done, or is taking care of itself, and his servant not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself and simply to gratify his own feeling of resentment, whether provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant for which he and he alone is responsible.”

The case of *Rounds v. Railroad*, 64 N. Y. 129, is one of the best considered cases in this country upon the subject, and clearly supports the views I have here expressed. At page 136, Judge ANDREWS puts the matter clearly:

“If he [the servant] is authorized to use force against another when necessary in executing his mas-

ter's orders, the master commits it to him to decide what degree of force he shall use; and if through misjudgment or violence of temper he goes beyond the necessity of the occasion and gives a right of action to another, he cannot as to third persons be said to have been acting without the line of his duty or to have departed from his master's business. If, however, the servant, under the guise and cover of executing his master's orders and exercising the authority conferred upon him, wilfully and designedly for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant as to that transaction does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service or for the purpose of executing his orders."

At page 137: "It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. . . . But the court could not say from the evidence that the brakeman [baggageman] was acting outside of and without regard to his employment or designed to do the injury which resulted, or that the act was wilful within the rule we have stated."

In the case of *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Case No. 10922, Judge CLIFFORD said: "The moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor and subject to their orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless and may be obliged to submit for the time without any means of redress."

In the case at bar, as stated by counsel for respondent: "The assault upon appellant was not committed upon the premises of the respondent, but appellant assaulted him upon the public highway near the premises of the respondent, and after being intercepted by respondent's agent while he was on the way to respondent's office in response to a telephone message from the respondent's agent requesting him to come to the office. Plaintiff was not under the 'control' of defendant or any of its agents and so 'helpless and obliged to submit without any means of redress' within the reason of the rule."

Where the reason for the rule stated by Judge CLIFFORD fails, the rule fails also, and therefore, the defendant was not the insurer of the safety of the plaintiff against assaults made by its agents, except when acting within the scope of their employment.

Thompson on Corporations (1 Ed.), in section 6298 states: That the old rule that the master was in no case liable for the wilful or malicious act committed by the servant is unsound. In section 6299, entitled "The True Test Suggested," he says: "The modern rule is, that if a servant, authorized to use force about his master's business, uses excessive force, his master must answer in damages to the person thereby injured, wholly without reference to the state of mind under which the servant acted. If he is required to use force, and is left to his discretion as to how much he shall use, the master will, upon either view of the subject [i. e., whether with or without malice], be answerable if he uses too much force through negligence."

In section 6300 he says: "It must now be conceded as a modern rule that the mere fact that the wrong complained of was wilful or malicious, or that in doing it the state of mind of the actor was really that which is characterized by the use of the words 'malice,' 'hatred' or 'ill-will,' does not exonerate the corporation from liability. But on the other hand,

this very state of mind of the actor may be relevant evidence, and in some cases of the most cogent nature, to show that when he did the act he was not acting for the corporation. . . . The actor may be the agent, and even a principal officer of the corporation, and he may even at the time of doing the wrongful act be intending to serve the corporation, and yet the act may be of such a character so extraordinary as to defeat any presumption that it could possibly be authorized by the corporation. . . . Assuming in such cases that there is authority to use force in case of resistance or non-compliance with orders, may not the force used be so extreme—may not the weapon employed be so unusual—as entirely to defeat this presumption of authority?"

In *Richberger v. Express Co.*, 73 Miss. 161, the court, at page 171, refers with approval to *Rounds v. Delaware, Etc. R. R. Co.*, 64 N. Y. l. c. 136, quoted in *Railroad v. Latham*, 72 Miss. 32, to show when in this character of case the corporation would not be liable, and quotes at the end of the opinion from *Rounds v. Delaware, Etc. R. R. Co.*, to show when liability exists.

Next consider 2 *Cooley on Torts* (3 Ed.—Lewis), sections 627, 631, 632. In section 627: "But the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed from the nature of his employment to have authorized or expected the servant to do."

Judge COOLEY, for the Supreme Bench of Michigan, in a case of a boy, the servant of defendant, driving over plaintiff, approved an instruction that "if the boy 'drove in a careless and reckless manner, he would be acting within the scope of his master's employment;

but that if he wantonly, wilfully and intentionally ran over the plaintiff, he would not be acting within the scope of his master's authority. But if he carelessly, unintentionally and accidentally ran over the plaintiff, then the plaintiff should recover.' ” “This instruction” (says Judge COOLEY) “was all the defendant could reasonably ask. It stated the law correctly and fairly. If it was a case of intentional injury, defendant was not responsible.” [Cleveland v. Newsom, 45 Mich. 62.] This opinion of Judge COOLEY's was approved and declared to be the law of Michigan in 1911 in the case of Ducre v. Sparrow-Kroll Lumber Co., 168 Mich. 49, opinion by McALVAY, a case where a salesman wantonly and wilfully beat with a hammer a drunken person who came into the store. “It was a wanton, wilfull and intentional injury committed without regard to consequences and within a narrow margin of having resulted in the crime of manslaughter. Under the circumstances presented by this record, such an act cannot be held to have been committed by this man while in the performance of his duties for defendant within the scope of his employment; and our conclusion is that, as a matter of law, no liability attached to the appellant.” [Ducre v. Lumber Co., supra.]

Woods' Law of Master and Servant (2 Ed.), sections 307-309.—In section 307 it is said: “The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business; but, whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.”

In section 309, at page 585, it is said: “He must have been authorized, either expressly or impliedly, to do the act in some manner, which he has improperly or wrongfully performed, and the fact that he was

only authorized to do the act in a certain way does not save the master from liability."

At page 586 it is said: "The rule may be stated thus: For a wilful and malicious trespass of a servant, not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant under mere color of discharging the duty which he has undertaken for his master, no action will lie against the master. But if the act of the servant was necessary to accomplish the purpose of his employment and was intended for that purpose, however ill-advised or improper, then it was implied in the employment, and the master is liable, though the servant may have executed it wilfully and maliciously."

In *Shearman & Redfield on Negligence* (6 Ed., by Street), sec. 146, p. 356, it is again said the master is liable for the acts of his servant in the course of the servant's employment. In section 148 it is said: "The fact that the servant was at the time of the injury engaged in the service of his master is not conclusive of the master's liability. . . . The act complained of must be within the scope of authority which the agent had from the master, or which the master gave the servant reasonable cause to believe that he had or which servants employed in the same capacity usually have or which third persons have a right to infer from the nature and the circumstances of the employment."

In *Clark & Skyles, on Law of Agency*, sections 491, 493, 494, 502, are cited. In section 502, concerning assault and battery by agent, it is said: "In accordance with the principles heretofore considered a principal may be held liable for an assault committed by his agent in the course of his employment and for the purpose of advancing the principal's interests. Hence, in cases where an agent is authorized to use force against another in order to carry out his principal's orders, the principal commits it to the agent to decide what degree of force he shall use," and the prin-

principal is held liable for excessive force or wanton assaults. "If . . . the agent . . . , where he is not authorized to use force at all, wilfully and designedly, for the purpose of accomplishing his own independent, malicious and wicked purposes, does an injury to another as by assaulting him, the principal is not liable therefor."

All such men should stand before the courts and jurors of their country in the nakedness of their crime, unveiled with the cloak of *apparent* authority from their employer, who never dreamed of such depravity, and receive the just punishment the law wisely prescribes for them. They are nothing but criminals disguised in sheep's clothing.

But it is said, what will become of the innocent and injured public *who* suffer at their hands? Answer: What becomes of the innocent and injured public *who* suffer at the hands of all criminals, regardless of their avocation in life? All such criminals should be swiftly tried and speedily punished for their violation of the law, regardless of the badge they wear, whether that of an individual, an agent or an officer of the law; and in my opinion, those who commit crime under the guise of real or apparent authority are more guilty than the individual who acts upon his own initiative and responsibility, for the latter knows that he must alone meet the charge and suffer the consequences thereof, whereas the former cowardly shield themselves behind their cloak of real or apparent authority to reek their hellish designs upon others.

The score and a half or more authorities cited in the majority opinion in support of companies' liability, as well as the many more that might be cited, show to what extent this subterfuge has been resorted to as a cloak under which to commit wrong, knowing or supposing that the company, prompted by its financial interests, will defend the civil side of all such civil actions, and thereby at the same time extract from the

crime the poisonous malignity which prompted it, and thereby stay criminal prosecution.

In my opinion, it would be for the better public policy to let all such criminals know that they, and they alone, must personally stand responsible for such crimes; and at the same time give full force and effect to the letter and spirit of the contract of employment, namely, that the agent is to transact the business of the employer in an efficient, prudent and careful manner, and not to commit crime against God and man under the cloak of its authority.

The law is and always has been that where the principal exercises ordinary care and prudence in the selection of an employee, he is not liable to a fellow employee because of injury inflicted in consequence of the unskillfulness of the former. That being true, then how much stronger is the reason for the law which universally holds that no person is liable for the crime of another without he is a party to it or a conspirator in its commission?

In the case at bar there is no evidence tending to show that the respondent employed Joiner to commit the crime charged in the petition, or that it was necessary for him to commit it in asking for the receipt, nor that the respondent conspired with him or knew of its commission until long thereafter.

Public service corporations must, because of the very nature of their business, conduct the same through numerous agents and the law presumes that they are men of good character and law abiding; and never presumes that any one will commit crime, and under that presumption it does seem to me that it is a harsh and unjust rule which holds such a company liable for the crime of one of its agents, the commission of which was not contemplated, necessary or within the scope of his employment, expressed or implied, but was wholly beyond the legal bounds of *contractual*

liability. If liable, it is because the company was a party to the crime, of which there is no evidence.

Of course, had Joiner injured the appellant while acting within the scope of his employment, the company should be held strictly liable, but not otherwise.

I am therefore of the opinion that the judgment of the circuit court should be affirmed. *Blair, J.*, concurs.

THE STATE ex rel. RUBY E. ODELL v. FRANK G. JOHNSON et al., Judges.

In Banc, February 9, 1916.

LISTING OF CASES FOR TRIAL: Rules of Court. In view of the facts set out in the opinion it is held that relator is not entitled by writ of mandamus to compel the presiding judge of the circuit court of Jackson county to make an immediate assignment of and set for trial her suit against the Metropolitan Street Railway Company et al. pending in said court.

Mandamus.

WRIT DENIED.

C. W. Prince, E. A. Harris and J. E. Westfall for relator.

(1) The cause was properly at issue when listed for jury trial. The answer of the defendant Metropolitan Street Railway Company was a general denial. The answer of the defendant Standard Oil Company under the authorities is a general denial and not a plea of contributory negligence. *Johnson v. Traction Co.*, 176 Mo. App. 182; *State ex rel. v. Rau*, 93 Mo. 130; *Jordan v. Buschmeyer*, 97 Mo. 97; *Watkins v. Railroad*, 38 Fed. 711; *Benjamin v. Railroad*, 245 Mo. 598.

(2) Relatrix was entitled to have her cause of action assigned for jury trial in its regular numerical order when reached in the regular, orderly and lawful procedure of the court in the trial of jury cases. Rule 22 of Circuit Court; Sec. 10, art. 2, Mo. Constitution. (3) The respondents, judges of the circuit court, violated the court's own rules as well as the substantive law of the State, in assigning other cases for jury trial which were listed for jury trial subsequent to the day on which relatrix listed her said cause for jury trial. Rule 22 of Circuit Court; Sec. 10, art. 2, Mo. Constitution. (4) Said respondents, judges of the circuit court, unlawfully and without authority refused to assign relatrix's cause of action for jury trial for the sole reason that the Metropolitan Street Railway Company was a defendant in relatrix's cause of action. Sec. 10, art. 2, Mo. Constitution. (5) This court has authority by mandamus to compel the respondents, judges of the circuit court, to assign relatrix's cause of action for jury trial. State ex rel. v. O'Bryan, 102 Mo. 254; State ex rel. v. Philips, 97 Mo. 347; State ex rel. v. Gibson, 187 Mo. 554; State ex rel. v. Grimm, 220 Mo. 489.

Clyde Taylor, John H. Lucas and Charles A. Stratton for respondents.

(1) The issuance of the writ of mandamus is within the discretion of this court. 19 Am. & Eng. Ency. Law (2 Ed.), p. 753-b; State ex rel. v. Cottengin, 172 Mo. 134; State ex rel. v. Bridge Co., 206 Mo. 74; State ex rel. v. Wilder, 211 Mo. 305; 26 Cyc. 143, 144. (2) "The Supreme Court will not grant the writ of mandamus to an inferior court unless it appear that the court has omitted or refused to perform its duty." State ex rel. v. St. L. Court, 41 Mo. 598, syl. 2; State ex rel. v. Hudson, 226 Mo. 265. (3) The writ will not issue when it will cause disorder and confusion. 26 Cyc. 146, citing: Bibb v. Gaston, 40 So. (Ala.) 936;

Bd. v. San Diego, 128 Cal. 369; People v. Olsen, 215 Ill. 620. (4) "Mandamus will not lie to control or review the exercise of the discretion of any court, board or officer when the act complained of is either judicial or quasi-judicial." 26 Cyc. 158; State ex rel. v. St. Louis, 158 Mo. 505; State v. Cramer, 96 Mo. 75; State v. Wilson, 49 Mo. 146; 26 Cyc. 160. (5) The manner of assignment and trial of cases is within the discretion of the circuit court. Laws 1913, p. 212; Rule 22 of Circuit Court; 26 Cyc. 208; Allen v. Calhoun, 6 Cowen (N. Y.), 32; Carpenter v. Jones, 121 Cal. 362. (6) Relator has been guilty of gross laches in this case. State ex rel. v. Reynolds, 243 Mo. 715. (7) Plaintiff's case was not at issue at the time she listed same as required by Rule 22 of the circuit court.

OPINION.

I.

BOND, J.—An original writ of mandamus was awarded by this court upon the relation of Ruby E. Odell, directed to the presiding judge of the circuit court of Jackson County sitting in the assignment division of that court by the authority of rule eighteen, adopted by the court, which imposed on him the duties of controlling the docket and assignment of causes. Our writ required said presiding judge to show cause why he should not make an immediate assignment and setting for trial of a certain suit pending in said court, brought by the relator against the Metropolitan Street Railroad Company and the Standard Oil Company.

To this alternative writ the presiding judge at the time and his successor made returns praying for the quashing of our writ. Relator moved for judgment on said returns and thereafter filed an answer to them, wherefore, a special commissioner was appointed to take the evidence and report his findings, and state his

conclusions of law to this court. In compliance with this reference, the commissioner, Hon. Willard P. Hall, has made his report and has recommended that the alternative writ of mandamus awarded herein be quashed, and the prayer for the peremptory writ be denied.

Counsel for the respective parties having been heard in oral argument and upon a submission of briefs on the issues involved, and the evidence taken before the commissioner, the cause was thereupon submitted to this court in Banc for decision.

II.

It is urged on behalf of the relator in support of the writ that the presiding judge of the assignment division of the circuit court of Jackson County was under the legal duty to assign her cause of action for trial to one of the divisions of that court in its regular numerical order, and the failure so to do was in disregard of rule 22 adopted by that court in the following terms:

Rules of
Court.

“ASSIGNMENT OF CAUSES.

“At least two weeks before the beginning of each term, and as often thereafter as may be necessary, the presiding judge shall cause to be posted on the bulletin boards in the assignment division and the circuit clerk’s office a notice requiring attorneys to file with the clerk of the assignment division on or before the date fixed in said notice a memorandum of each case at issue of which a trial is desired, between the numbers stated in said notice. A separate memorandum shall be filed for each case, and such memorandum shall contain the number and title of such case, and the attorneys of record of each of the parties thereto.

. . .

“The presiding judge shall, from time to time, make and cause to be posted as above, settings of the cases thus noted for trial. On the day that such cases are set for trial they shall be placed in numerical order on the ‘Trial’ list, and the first case on such ‘Trial’ list shall be assigned to the next waiting division.”

The transcript of the evidence filed by the commissioner shows that on the 20th of January, 1911, the foregoing rule was modified by the court *en banc* and publication of such modification was made in the daily record, to-wit:

“NOTICE.

“Beginning with the January term, a new plan will be inaugurated in the assignment of cases against the Metropolitan Street Railway Company. Twelve of the lowest numbered cases (no more than three cases in which plaintiffs are represented by the same attorneys) will be set down for each week.

“The court will expect plaintiffs to be ready when cases are reached for assignment and will expect defendant to keep three attorneys constantly available and ready to try any of such cases.”

The report of the special commissioner further shows that in January, 1913, another change and modification was made in the foregoing rules; viz., “Metropolitan cases were separately listed without any limitation as to number except that the assignment judge would not set more cases for trial than thought proper, and enough cases would be set for trial to keep at least three divisions of the court always busy. And it was ordered that attorneys for plaintiffs in Metropolitan cases should receive twenty-four hours’ notice of the setting of their cases for trial.”

The authority of the circuit court of Jackson County *en banc* to make reasonable rules for the conduct of its business and modification thereof, was inherent in its constitution as a court of general juris-

diction and specially conferred by a statute including that court and defining its powers.

Section 3970, Revised Statutes 1909, provides:

"In addition to the ordinary power of making rules conferred by the general law, the court *en banc* may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein."

Laws 1913, p. 212, provide:

" . . . Members of the court *en banc* . . . shall have power to frame and enact such rules for the numbering of civil cases now pending or hereafter brought therein, for the proper distribution of civil cases for trial and disposition among the nine divisions of said court at Kansas City, and for the transfer of civil cases to and from each of said seven divisions and the Independence divisions, which rules may in like manner be changed from time to time, as may be found necessary. . . ." [Allen v. Calhoun, 6 Cowen (N. Y.), 32; Carpenter v. Jones, 121 Cal. 362.]

The foregoing rules and modifications thereof were in force when this writ was prayed.

The facts as to the suit brought by plaintiff against the Metropolitan Street Railway Company and Standard Oil Company, were these: Said suit was begun on the 26th of November, 1910. Its docket number was 54,386. Owing to the pleadings filed by defendants and the efforts made by one of them to remove the case, and owing to the retiracy of the original counsel for plaintiff, no issue was reached on the original petition, but an amended one was filed on the 9th day of April, 1914. To this amended petition separate answers were filed by the defendants on July 18 and August 21, 1914.

In January, 1915, court *en banc* turned back in the listing of cases and made two calls; first, for the listing of cases for trial from number 16 to 53,997 and

thereafter in the same month called for all cases from number 54,001 to 70,000.

On February 1, 1915, relator listed her case for trial under the last call. On June 7, 1915, relator filed a reply to the answers of defendants and at the same date filed a motion praying her cause of action be specially set or assigned for trial. This motion was overruled on the 9th of June, 1915, because in conflict with the rules then in force regulating the order of trials of causes, to which action of the court relator duly excepted.

If the replies filed by relator were essential to the joinder of issues on the answers to her suit against respondent then her cause of action was not assignable for trial under the rule and amendments thereof, because it had not been previously listed. But waiving that technical point and construing her replies to have been unnecessary, for the reason that in their essence the answers of the two defendants were only general denials, the question remains, whether under the record and the rules and the amendments thereof in the circuit court then in vogue, that court abused its discretion in overruling relator's action.

III.

In his finding as to the workings of the court rules as amended, the learned commissioner finds that they were formed to expedite the trial of Metropolitan cases and have expedited the trial of all other cases as well; that the capacity of the nine divisions of the court does not suffice to keep pace with its docket, hence, no cases are tried at the return term, and the court, when cases are reached which are returnable to the term preceeding the one in session, generally turns back to the beginning of the docket. That in so doing it does not necessarily turn back on the two lists of cases (Metropolitan and general) at the same time, for one may be ahead of

Listing of
Causes for
Trial.

the other, since no case is listable until at issue and every case bears, at all times, its original number, and when listed, must be listed according to the date of its original number and not the date when issue was joined.

Under this system of return calls of its docket from the beginning, the court also postpones the trial of cases listed under such calls to those which have been listed under previous calls and are undisposed of. These latter are assigned for trial before the cases newly listed. The application of this order of business to the matter in hand was that the court *en banc* called on November 5, 1913, for a listing of general cases, and on February 30, 1913, for a listing of Metropolitan cases—in both instances between the same numbers; to-wit, 16 (that being the beginning of the docket) and 59986.

During the year 1914, the court called for a listing of two classes of cases from 59986 to a higher number. In following the plan provided for in its rules as modified, the court did not again call for a listing of its docket from the beginning within numbers which would include relator's case until January 15, 1915, and it was after this call that her case (number 54386) was listed, on February 1, 1915, as previously stated.

At the time relator's case was thus listed there remained unassigned other Metropolitan cases of higher numbers previously listed under regular calls. Upon these facts the commissioner finds; viz., "Relator's case has been treated regularly and consistently in accordance with the system in force in the circuit court as herein outlined. No claim to the contrary is made for the relator. Relator's motion to assign her case for trial was, in effect, for a special setting of her case, and was denied for that reason and because in conflict with said system."

As the court overruled the motion of relator to set her case specially for trial because that would

result in a violation of the orderly procedure prescribed for the calendar of its docket and the trial of the cases pending thereon, it necessarily follows that the legality of its action in so doing is the only thing to be considered. The theory of relator is that the modification of rule 22 wrought out a plan which gave the trial of cases listed generally a right of precedence over the list of cases against the Metropolitan Street Railway Company in contravention of the Constitution; to-wit, "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." [Const. of Missouri, sec. 10, art. 2.]

It has been uniformly held that this provision does not deprive the courts of general jurisdiction of their power to make reasonable rules governing the order of trial of cases and regulating their proceedings in their administration of the law. That the exercise of such inherent and necessary power on the part of the courts does not violate the above quoted clause of the organic law. [Toledo v. Preston, 50 Ohio St. 361; Ex parte Pollard, 40 Ala. 77; Stamey v. Barkley, 211 Pa. St. 313; Bruns v. Crawford, 34 Mo. 330; Johnson v. Higgins, 3 Metc. (Ky.) 566; Richardson Fueling Co. v. Seymour, 235 Ill. 319; Rauchberger v. Street Ry. Co., 52 N. Y. Misc. 518; Merchants' Bank v. Greenhood, 16 Mont. 395; Maloney v. Hunt, 29 Mo. App. 379; Smith v. Keepers, 5 N. Y. Civ. Proc. 66; Honeywell v. Shaffer, 18 N. Y. Civ. Proc. 336; Jensen v. Fricke, 133 Ill. 171; Cochrane v. Parker, 12 Col. App. 169.]

There being no constitutional objection to the rules of the circuit court and no evidence of their intrinsic unfairness, favoritism or injustice under the facts stated in the record and reported by the commissioner, it follows that there is no error in the rule of the court declining to specially set for trial the

case of relator against the companies contrary to the order in which it would be triable under the rules as amended.

IV.

We have disposed of this question as to the validity of the rules of the court on the merits and without discussing its reviewability by a writ of mandamus issuing out of this court. We have done this on account of the importance to the court and litigants of a speedy determination of the legality of the rules for the exercise of the machinery of the court. We do not mean to concede by the course taken in this case that a precedent shall be established for the use of our writ of mandamus in such cases. That writ is never available to compel a court to render a *particular* judgment or ruling on a matter resting within its judicial discretion. The officer vested with a judicial discretion may be compelled to exercise it, but the manner of its exercise or decision to be made in so doing cannot be controlled by a writ of mandamus. For that would wrest from him the very official discretion confided by law. [State ex rel. v. Jones, 155 Mo. l. c. 576.] Nor is there any intimation to the contrary in any of the cases cited by the learned counsel for the relator in the present proceeding.

For the reasons stated in the preceding paragraphs of this opinion our alternative writ of mandamus is quashed and the application for a peremptory writ is denied. *Graves and Walker, JJ.*, concur; *Woodson, C. J.*, and *Faris, Blair and Revelle, JJ.*, concur in result.

THE STATE v. MELVIN WEBB, Appellant.

In Banc, February 9, 1916.

1. **FELONIOUS ASSAULT: Wounding With Fists.** Under section 4483, Revised Statutes 1909, which is the maiming or wounding statute, it is not necessary to prove malice or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. The wounding and maiming may be done with the fists, and to support the charge it is not necessary to establish that the wounds were of a dangerous character, or such as are likely to produce death.

Held, by FARIS, J., dissenting, with whom WOODSON, C. J., and GRAVES, J., concur, that it is essential that an information drawn under Sec. 4483, R. S. 1909, aver the circumstances themselves which, if death had ensued, would have made the offense manslaughter, and that not having been done it is unnecessary to rule whether said statute can be violated by an assault with fists, or by the fists aided adventitiously by a finger ring.

Held, also, that if it be true, as announced by the majority opinion, that it is not necessary to establish that the wounds inflicted were of a dangerous character or such as are likely to produce death, it logically follows that any wound is, under said statute, sufficient to constitute felonious assault, and thereby the boundary line between common and felonious assault has been wiped out.

Held, also, that said section 4483 denounces but two crimes: 1, The endangering of the life of another; and 2, The infliction of great bodily harm, either by (a) wounding, (b) maiming, or (c) disfiguring.

2. ———: ———: Information. Under said statute it is not necessary to allege the particular means by which the wounding or maiming was done, since this may be accomplished by any means.
3. ———: ———: ———. Proof. An assault may be charged to have been committed by different means, and proof of any will sustain the charge.

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4. ———: ———: Evidence of Provocation. The court did not err in withdrawing from the jury's consideration testimony to the effect that the prosecuting witness, a school teacher, some hours before the assault with fists, had chastised defendant's son. That chastisement was neither a defense to nor in mitigation of the charge of felonious assault under Sec. 4483, R. S. 1909, where the wounding and maiming did not result in death.
5. ———: ———: Instruction: Presumption: Intention to Kill: Harmless. Evidence that defendant, wearing a heavy finger ring on one finger, struck the prosecuting witness with his fists, knocked him to a hard road, severely beat him on the head and over his eyes and ears and other parts of the body where great and permanent bodily injuries could have been easily afflicted, was sufficient to authorize an instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts," and that if they believe from the evidence the defendant assaulted the prosecuting witness "in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or to do him some great bodily harm." It is not required that a deadly weapon be used in order to justify such an instruction. *Held*, also, that, as this instruction was probably given more particularly in connection with the first count, which charged an assault with intent to kill or do great bodily harm, and defendant was acquitted on that count, and the second count charged wounding and maiming on which alone he was convicted, and nothing appearing to indicate that the severe injuries were not intentionally inflicted, he cannot complain of the instruction.

Held, by FARIS, J., dissenting with whom WOODSON, C. J., and GRAVES, J., concur, that the human fist, even when aided by a finger ring, is not judicially noticed as being a deadly weapon, and therefore the words of the instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts" were erroneous, since, under such circumstances, the law does not presume that death or great bodily harm is a natural or probable consequence.

Appeal from Audrian Circuit Court.—*Hon. James D. Barnett*, Judge.

AFFIRMED.

Fry & Rodgers and Pearson & Pearson for appellant.

(1) The verdict was against the law and the evidence. There was no felony committed. There was no felonious assault made, or proven. (a) As shown by the testimony of the prosecuting witness, Tugel, and the two State witnesses, who saw the assault, Tugel was not struck with anything, except the fist of the defendant; and not in such a manner as to cause any apprehension in their minds, at the time, that Webb had any intention to kill, or do great bodily harm; or, that the natural and probable result of such blows, would likely cause death or great bodily harm. The charge, in the second count of the information, that the defendant made an assault, "with a certain large finger ring" was not proven, nor attempted to be proven. It is a fact, "known to all persons of ordinary intelligence," that one man cannot make an assault upon another, with his fist, in a manner likely to cause death or great bodily harm—except, perhaps, in very extreme cases. *Rogers v. State*, 60 Ark. 76, 31 L. R. A. 468. This assault was nothing more than an ordinary assault with the fist. The jury should not have been left to guess, or presume, as they were by instruction seven, that the assault was made in a manner likely to produce death, or cause great bodily harm; and that the defendant was presumed to know, that an ordinary lick, or a number of them, with his fist, on any part of a man's head or body, was likely to cause death, or great bodily harm; and therefore, was guilty of a felony. *State v. Harris*, 209 Mo. 439; *State v. Dunn*, 221 Mo. 541. (b) All the text-writers and cases treat an assault with the fist simply as a misdemeanor. *Rogers v. State*, 60 Ark. 76; *State v. Sayman*, 103 Mo. App. 142; *State v. Shawley*, 42 Mo. App. 585. (2) The court erred in giving instruction three

on the part of the State. The verdict found "the defendant guilty of felonious assault, as charged in count two, of the information." (a) The instruction is broader than the information. It does not confine the jury to finding an assault made with a certain large finger ring, and with hands and fists; but, is a roving instruction, giving the jury the right, if they saw fit, to find that the assault, if any, was made with a sledge hammer, a hatchet, a large stick of wood, a knife, or any other dangerous, or deadly weapon, or instrument. In a civil action, such a variance between the allegations of the petition, and an instruction, would be reversible error. The principle is just as pertinent in a criminal proceeding. *Reading v. Railroad*, 165 Mo. App. 130; *Davidson v. Transit Co.*, 211 Mo. 320; *Beave v. Transit Co.*, 212 Mo., 331; *Miller v. Railroad Co.*, 155 Mo. App. 528; *State v. Harris*, 209 Mo. 438. (b) There is no evidence upon which to base an instruction for a felonious assault in this record. The evidence shows, that the defendant assaulted, or struck prosecuting witness, with his fist, nothing more. The jury had none of the marks, bruises, or cuts, alleged to have been made by the assault, shown to them, which is necessary to be shown, before they can find a felonious assault. *State v. Drumm*, 156 Mo. 220. And this too, notwithstanding the charge in the information, that defendant did greatly maim, wound and disfigure which is the bodily harm charged to have been inflicted, and necessarily must have proven to have been inflicted, in order to convict of a felony. The evidence showed that there were absolutely no marks, or scars, on the head or body of the prosecuting witness, showing any evidence, or result of the assault. *State v. Drumm*, 156 Mo. 219; *Rogers v. State*, 60 Ark. 76, 31 L. R. A. 468. (3) The court erred in giving the seventh instruction on the part of the State. There was no evidence

from which the jury could find that the defendant assaulted Mr. Tugel, in a manner likely to cause death or great bodily harm. And, he was not, and there was no proof that he was, greatly maimed, wounded or disfigured. Therefore, there was no evidence upon which to base this instruction. The glaring fact, that the actual assault with the fist, did not cause death, or great bodily harm, refutes the presumption that defendant intended to kill Tugel, or do him great bodily harm. The natural and probable consequences of an actual assault with the fist are the actual consequences thereof; and, it was error for the court to instruct the jury, that the law presumed the defendant intended to kill Tugel, or to do him great bodily harm, when, as a matter of fact, his assault upon him only inflicted some minor bruises and a skin scratch. *Rogers v. State*, 31 L. R. A. 468. It is only where an assault is made with a deadly weapon, or aimed at a known vital part of the head, or body, of a person, that the court is justified in declaring, that the law presumes that a man intended to kill another, or to do him some great bodily harm. *State v. Harris*, 209 Mo. 439; *State v. Ruck*, 194 Mo. 430. Unless the court is justified in declaring, as a matter of law, that the natural and probable consequences of an assault of one man upon another, with his fists, is likely to cause death, or great bodily harm, it is not justified in declaring that, the law presumes that he intended to kill him, or do him great bodily harm, by such assault. Similar instructions to this seventh are found in the law books, but they are only given when the assault is made with a deadly weapon, or aimed directly at some vital part of the head or body. *State v. Taber*, 95 Mo. 591; *State v. Musick*, 101 Mo. 270; *State v. McKenzie*, 102 Mo. 630; *State v. Grant*, 152 Mo. 64; *State v. Harris*, 209 Mo. 432, 439; *State v. Stubblefield*, 239 Mo. 530. This seventh instruction is almost, a peremptory in-

struction to the jury, that the natural and probable consequences of the acts of a man who assaults another with his fists, is death, or great bodily harm; and, that in so doing, the law presumes that he intended to kill him, or do him great bodily harm.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) The second count of the information charges felonious assault under Sec. 4483, R. S. 1909, and is in a form approved by this court. *State v. Bailey*, 21 Mo. 484; *State v. Moore*, 65 Mo. 606; *State v. Nieuhaus*, 217 Mo. 332; *State v. Janke*, 238 Mo. 378. (2) It has been held that Sec. 4483, R. S. 1909, does not require that the wounding should have been done with a deadly weapon. *State v. Janke*, 258 Mo. 382; *State v. Nieuhaus*, 217 Mo. 548; *State v. Bailey*, 21 Mo. 484; *State v. Munson*, 76 Mo. 109. The evidence does disclose that the appellant wore, at the time of the assault a large ring with three sets in it, and after the assault, the appellant remarked in the presence of Miss Tully that his hands and finger were sore and he would have to get the ring off. The evidence for the State further showed that Tugel's face had been cut and bruised in about twenty places and that at the time of the trial, the hearing of Tugel was still defective on account of the bruises he had received on his ear. This is called to the court's attention for the reason that in appellant's brief, it is stated that the charge that the defendant made an assault with a certain large ring was not proven nor attempted to be proven. The evidence clearly shows that this appellant gave Tugel about as severe a beating as could be given with the fists and a ring as described in the evidence in the length of time that the assault was continued. The cases cited by the appellant are not in point. (3) The State's instruction number three

properly states the law under Sec. 4483, R. S. 1909. There is no requirement under the statute that the instruction should state that the assault was committed by a deadly weapon or any particular weapon. It is only required that the party be wounded and receive great bodily harm and under circumstances which would constitute murder or manslaughter if death had ensued. *State v. Janke*, 238 Mo. 382; *State v. Nieuhaus*, 217 Mo. 348; *State v. Ruck*, 194 Mo. 430; *State v. Munsey*, 76 Mo. 109; *State v. Bailey*, 21 Mo. 484; *Kelly's Crim. Law & Proc.* (3 Ed.) 581. A reading of the evidence will show that the facts were sufficient to warrant an instruction on felonious assault. *Kelly's Crim. Law & Proc.* (3 Ed.), sec. 296; 8 Am. & Eng. Ency. Law, 286; 12 Cyc. 152. (4) The giving of State's instruction number seven on presumption of the intent was proper. A criminal intent is generally inferred from the commission of the unlawful act. *State v. Schloss*, 93 Mo. 361; *State v. Hall*, 85 Mo. 66; *State v. Davis*, 226 Mo. 493; *State v. Sylvia*, 130 Mo. 440; *State v. Ruck*, 194 Mo. 431; *State v. Kempf*, 26 Mo. 430.

REVELLE, J.—Prosecution by information filed in the circuit court of Audrain County, charging felonious assault upon D. E. Tugel. Trial, verdict of guilty, assessment of punishment at fine of \$200; appeal in regular form.

Evidence on the part of the State: The assaulted was at the time of the difficulty superintendent of public schools at Vandalia, in Audrain County, Missouri, and defendant was an inhabitant of that town, having a son who attended the school over which prosecuting witness exercised superintendence. From record *indicia* it seems that the prosecuting witness had, in the morning prior to this assault, administered some punishment to the son of defendant, and that, after the noon recess, and as prosecuting witness was returning

to the school, was accosted by defendant, who said: "I want to see you." When close enough defendant seized prosecuting witness by the coat and vest and asked him if he had slapped his boy. Upon receiving an affirmative reply defendant struck the prosecuting witness, who with two packages of books which he held attempted to ward off and shield himself from defendant's blows. After being struck several times the prosecuting witness went to the ground, which is described as hard and dry and a road belabored with much traffic. Defendant then pounced upon and straddled the prosecuting witness and beat him over the head, striking him frequently in the eyes, ears and face. After prosecuting witness had twice stated in reply to defendant's two inquiries that if he had been wrong he would apologize to the son, defendant, either voluntarily, or because of the interference of others (the evidence is not clear), desisted from further assault. With the aid of others, the prosecuting witness was then placed on his feet and taken home, where an examination of his injuries disclosed the following: His eyes were bloody, bruised, sore and badly swollen, and he was unable to recognize the parties who had escorted him to his home. The lid of one eye was cut entirely through, and he was unable to use his right eye at all, with very little use of his left eye. The teeth on the right side of his jaw were loose, and the left side of his back, face and ear were bruised for considerable time thereafter. Even at the time of the trial his hearing was seriously affected. He felt unable for a week and a half after the assault to perform his regular duties, and for quite a while suffered from nervousness and pain. The evidence also discloses that defendant usually wore a heavy finger ring bedecked with sets, and that at the time of the assault this ring was on one of his fingers.

On the part of defendant the testimony tended to show that upon the return of his son from school at

the noon hour he was informed that the prosecuting witness had punished him in school, and that soon thereafter he encountered the prosecuting witness on the street and asked him "why he had beat his boy over the head," to which the prosecuting witness replied: "I am running that school." After some little conversation on this subject the prosecuting witness became angry and struck the defendant, whereupon a fistic fight ensued. Upon being told by the prosecuting witness that he would apologize for the punishment that he had administered to the son, the defendant voluntarily withdrew from the difficulty.

I. Instructions on both common and felonious assault were given, but defendant insists that there is no evidence upon which to predicate the instruction on felonious assault, or the verdict which convicts him of that offense. The facts are fully set out in the preceding statement and repetition would but encumber. In disposing of this and other assignments it must be borne in mind that the information is bottomed, the cause was submitted, and the verdict based upon section 4483, R. S. 1909, which is the maiming or wounding statute, and which prescribes a different and less offense than that defined by either section 4481 or 4482. Under this section it is neither necessary to charge or prove malice, or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. [State v. Bailey, 21 Mo. 484; State v. Nieuhaus, 217 Mo. l. c. 348; State v. Janke, 238 Mo. l. c. 382-3.] This assault was clearly committed, if the State's evidence be given credence, under circumstances which would have made it murder or manslaughter had death ensued, and this not-

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withstanding that the wounding and maiming were done only with the fists. [State v. Hargraves, 188 Mo. 337, and cases supra.] That the prosecuting witness was wounded and received great bodily harm abundantly appears from the facts. [State v. Leonard, 22 Mo. 449; State v. Nieuhaus, 217 Mo. l. c. 347.] To support this charge it is not necessary to establish that the wounds inflicted were of a dangerous character, or such as are likely to produce death. [State v. Agee, 68 Mo. 264; State v. Bailey, 21 Mo. 484; State v. Nieuhaus, 217 Mo. l. c. 347; State v. Janke, 238 Mo. 378.] The evidence is sufficient to sustain the verdict and we cannot invade the jury's function.

II. Complaint is made of instruction number 3, because it did not confine the means by which the assault was made to "a certain large finger ring and with hands and fists," which is the allegation in the information. In answer to this contention it suffices to say that, in the first place, it was not at all necessary to allege in the information the particular means by which the maiming and wounding were done as this may be accomplished by any means; and, in the second place, it is well settled that an assault may be charged to have been committed by different means, and proof of any will sustain the allegation. [State v. Nieuhaus, 217 Mo. l. c. 344; State v. Hottman, 196 Mo. 110; State v. Myers, 198 Mo. 225.] Aside from this and if it be conceded that the instruction is somewhat broad, we do not believe, in view of the theories and evidence upon which this case was submitted and the other instructions given, that the defendant was thereby prejudiced. In fact, the main insistence of defendant here is that the means alleged in the information and by which the proof discloses the assault was made is of such a character that a felonious charge cannot be bot-

tomed thereon. This assignment must be ruled adversely to defendant.

III. It is also said that error was committed in withdrawing from the jury's consideration the record *indicia* that the prosecuting witness had, **Provocation.** some hours prior to the assault, and as superintendent of schools, chastised defendant's son for some infraction of school rules. It cannot be, and it is not, seriously contended that this could justify the assault. In the first place had death ensued as a result of this assault, the fact of this chastisement would not have reduced the crime from murder to manslaughter, for it constituted no *lawful* provocation as distinguished from *just* provocation, which is necessary to reduce. In fact, when we consider the time that had elapsed, and the conduct of defendant after he had learned of the chastisement and before he made the assault, it can hardly be said that the punishment administered to his son amounted to even just provocation had death ensued, but this is unimportant, for even had his provocation been sufficient to reduce from murder to manslaughter, in the event of death, it is neither a defense to nor in mitigation of this charge, because it is written that the offense is complete when committed "in cases and under circumstances which would constitute *murder* or *manslaughter* if death had ensued." The most that can be said of this evidence is that it tended to establish an unlawful motive for the assault, and while it was insisted in argument that no person would commit murder or inflict great bodily harm because of this provocation, the records of this court and human experience establish the contrary. [State v. Heath, 221 Mo. 565; State v. Heath, 237 Mo. 255.] The exclusion or withdrawal of this evidence, if error, was error in defendant's favor, and of it he cannot complain.

IV. It is finally insisted that instruction number 7 should not have been given. This instruction is as follows:

“The court instructs the jury that the law presumes that a person intends the natural and probable consequences of his acts, and if you believe from the evidence in the case that defendant assaulted D. E. Tugel in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or do him some great bodily harm.”

No fault is found with its form, the complaint being that there was no evidence from which the jury could reasonably find that the defendant made the assault in a manner likely to cause death or great bodily harm. In this connection counsel for defendant say: “He was not and there was no proof that he was greatly maimed, wounded or disfigured. The glaring fact that the result of his fists did not cause death or great bodily harm refutes the presumption that defendant intended to kill or do great bodily harm.” With this we cannot agree. The evidence discloses, as heretofore stated, that defendant assaulted the prosecuting witness, violently struck and severely beat him over the head, eyes, ears and other parts of the body where serious, great and permanent bodily injury could be easily inflicted. On one of his fingers he wore a heavy ring, and his statements after the difficulty disclose that he had used such force and violence as to injure his own finger and hand. Without going into detail as to the character of the injuries inflicted, it is sufficient to say that they constituted great bodily harm. Considering also the fact that at the time they were being inflicted the prosecuting witness’s head was on hard, dry ground, it cannot be said that his acts did not warrant the conclusion that he intended to do great bodily harm. While it is true that this instruction is given generally in cases where a

deadly weapon is used, yet it is not because of the use of such a weapon that the instruction is proper; it is because the use of such a weapon is one fact tending to show his intention, but this does not mean that such an intention cannot be reasonably inferred from other facts and other means of attack. There is nothing whatever in this record to indicate that defendant did not intend to inflict the wounds which he did, nor is there anything to show that such were not the natural and ordinary consequences of his acts. It is our opinion that the evidence is sufficient to warrant the giving of this instruction. In this connection it might be further said that the information contained two counts, and that the State was entitled to have the law upon both counts fully declared. The first count charged assault with intent to kill, or do great bodily harm; while the second count, as heretofore stated, charged a wounding and maiming. This instruction was perhaps given more particularly in connection with the first count, on which defendant was acquitted, and to that extent he cannot complain. In view of the disclosures that the prosecuting witness was in point of fact severely injured, and nothing appearing to indicate that these injuries were not intentionally inflicted, it cannot be said that this instruction was prejudicial or improper.

We have reviewed the entire record in this case, and are of the opinion that the defendant has had a fair trial, and that the verdict is warranted by the evidence. The judgment is therefore affirmed.

PER CURIAM.—This cause having been transferred to Court in Banc from Division Two, on the dissent of *Faris, J.*, and having been reargued and submitted, the foregoing opinion of *REVELLE, J.*, is adopted as the opinion of the court. *Bond, Walker and Blair, JJ.*, concur; *Woodson, C. J.*, and *Graves and Faris, JJ.*, dissent. *Faris, J.*, dissents in separate

opinion in which *Woodson, C. J.*, and *Graves, J.*, concur.

FARIS, J. (dissenting)—I am unable to concur in the majority opinion herein for three reasons, which I briefly summarize thus:

First. The doctrine announced in this case breaks down the distinction between a common assault and battery and a felonious assault, whereby maiming, wounding, disfiguring and great bodily harm ensues.

Second. Instruction numbered seven under the facts here (the producing cause and nature of the battery regarded) is misleading, erroneous and harmful.

Third. Instruction three is broader than the information, in that it fails to confine the jury in their consideration of the producing causes of the effects found to the causes pleaded in the information. I shall briefly set forth the reasons I have in mind for these views.

I premise what I shall say to the first objection by eliminating the question whether section 4483, **The Statute.** under which this prosecution is had, can be violated by an assault with the fists, or by the fists aided adventitiously by a finger ring. It may well be legally possible under circumstances of great advantage taken, or of great disparity of size, or of age, or of physical condition, and of the exhibition by the accused of ferocious brutality in the infliction of the injuries, to eke out a violation of this statute with these weapons of nature. [5 C. J. 732.] But in such case the information ought to aptly charge the facts which go to distinguish such a battery from the ordinary battery. [Jennings v. State, 9 Mo. 852.] For it is said in that case that "It is essential in an indictment under the 35th section (now section 4483) to aver the circumstances themselves, which if death had ensued, would have made the offense man-

slaughter." This has not been done in this case; hence the question suggested is not before us, and we are relieved from the duty of ruling it.

I am impressed with the view that the majority opinion by its application of the definition of a wounding under said section 4483, and within the purview thereof, has not only trespassed upon the zone of demarcation which separates and distinguishes an ordinary assault and battery from the more serious and felonious assault and wounding, but has wiped out the boundary between the two utterly. Attend to the reasons for this view: The majority opinion says succinctly that within the purview of said section 4483, "it is not necessary to establish that the wounds inflicted were of a dangerous character, or such as are likely to produce death." From such view it would seem logically to follow that any wound is sufficient. A wound, says Cyc., is "an injury to the person by which the skin is broken." [40 Cyc. 2865.] So, the fault I find is that there are left no landmarks under the majority view in this case which point out the difference between one assault with the fists which constitutes a felony and another assault with the fists which constitutes but a mere misdemeanor.

The statute of this State defines by preclusion and denounces a common assault and battery thus: "Any person who shall assault, or beat or wound another, under such circumstances as not to constitute any other offense herein defined, shall," etc. [Sec. 4484, R. S. 1909.] Under a definition of a wounding as contained in the majority opinion, any breaking of the skin is a wounding within the purview of said section 4483, whether done by old or young, weak or strong, healthy or unhealthy, by a single blow of the fist, or by many such blows. Given a blow by which the skin is broken and blood flows ever so little, a felony has been committed, if a prosecuting attorney so wills; because, forsooth he who is struck might have fallen

(under circumstances not even required to presently exist), into a river, or over a cliff, or against a rock, or on the paved street, or upon a concrete gutter edge or other adventitious but convenient foreign substance, and death thereby follow. Thereby I fear the line separating a misdemeanor from a felony is destroyed. And one engaging in a fist fight becomes a felon, if mayhap he be *persona non grata* to the prosecuting attorney, in whose hands is thus placed the arbitrary power to make a felony of that which was before but a misdemeanor of the minor sort. I characterize such a misdemeanor as minor because of the well-known hot passions of men which impel them to resent an ill word with a swift blow.

Discussing the expression "great bodily injury," which confessedly is *in pari materia* with, but stronger than, the phrase "great bodily harm" of section 4483, of our statute, as well as another point important and germane to one phase of this case, the Supreme Court of Arkansas said:

"The phrase 'great bodily injury,' is difficult to define, for the reason that it well defines itself. It means a 'great bodily injury,' as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault, something more than attack with the hand or fist would usually be required, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such extreme severity as to produce great bodily injury, and yet be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty

of a felony, depending upon the circumstances; but, as such an injury may, under some circumstances, be committed, and still the offender not be guilty of a felony, it is therefore not accurate to define 'great bodily injury' as 'a felony committed on the person.' "[Rogers v. State, 60 Ark. 76, 31 L. R. A. 1. c. 468.]

It is a significant fact, though concededly not a wholly decisive one, that in all the suggested forms for indictments found in the excellent local treatise of Judge KELLEY, *there is not one* but which connotes the use of some instrument or implement of attack of a deadly or dangerous nature. Of an indictment under section 4483, for the use of nature's weapons, there is no form given. [Kelley's Crim. Law & Pr., sec. 580.] Likewise is it significant that there has never before been in this State a case wherein a prosecution was had for a battery accruing from the use of mere fists. At least, a fairly exhaustive search for such a one has not been rewarded. These are the cases and the instrumentalities: State v. Leonard, 22 Mo. 449 (a large stone, said to have been a "deadly weapon"); Johnston v. State, 7 Mo. 183 (a stick of timber); Jennings v. State, 9 Mo. 852 (a large iron auger); State v. Freeman, 21 Mo. 481 (an iron shovel); State v. Bohannon, 21 Mo. 490 (a rock, and that maiming occurred in that a thumb was bitten off); State v. Thompson, 30 Mo. 470 (a hoe handle); State v. Moore, 65 Mo. 606 (a knife); State v. Agee, 68 Mo. 264 (a pistol); Carrico v. State, 11 Mo. 579 (a large piece of wood); State v. Bailey, 21 Mo. 484 (a large block of wood); State v. Davis, 29 Mo. 391 (a knife); State v. Janke, 238 Mo. 378 (by beating with fists, choking with the hands and stamping on and kicking with the booted foot and by striking with a hard but unknown weapon); State v. Nieuhaus, 217 Mo. 332 (a raw-hide whip three-fourths of an inch in diameter and a heated iron stove lifter, nine inches long, an inch thick and weighing one pound); State v. Munson, 76 Mo. 109 (a pistol); State

v. Van Zant, 71 Mo. 541 (a knife); State v. Vaughn, 164 Mo. 536 (a knife); State v. Havens, 95 Mo. 167 (a large, heavy stone); State v. McQuaig, 22 Mo. 319 (a knife); State v. Feaster, 25 Mo. 324 (a large stick); State v. Herreford, 29 Mo. 399 (a knife, *semble*); State v. Ray, 37 Mo. 365 (a knife).

Moreover, the majority opinion seems to treat section 4483 as if the fact of wounding by a mere breaking of the skin is the only prerequisite, and as if there were five offenses denounced by said section, viz., (a) *maiming*, (b) *wounding*, (c) *disfiguring*, (d) inflicting great bodily harm, and (e) acts endangering the life of another. On the contrary the three first words are obviously *ejusdem generis*, so they may all be charged in the conjunctive in the same count of a single indictment. If they are not *ejusdem generis*, and if they do denounce five separate and distinct crimes, then the information in the instant case, as well as all of the known and used forms of indictment under this section, have offended for duplicity (Kelley's Crim. Law & Pr., sec. 580; State v. Janke, *supra*; State v. Nieuhaus, *supra*; State v. Munson, *supra*; State v. Van Zant, *supra*; State v. Brown, 60 Mo. 141; State v. Moore, *supra*; State v. McQuaig, *supra*); and practically all, if not all, others cited *supra*, for *they charge in one count* two, three and more, often *four*, of the *alleged distinct crimes*; besides, it has been specifically held that such an indictment (i. e., an indictment charging a *wounding, disfiguring and the infliction of great bodily harm*) charges but one offense. [State v. Herreford, *supra*.] That there is one case wherein the contrary is held in an *obiter dictum*, after an ample reason for the holding there was apparent and was given, does not alter this view. The conclusion therefore is inevitable that the wounding connoted by said section 4483 is a maiming-and-disfiguring, wounding, from which great bodily harm ensues, and

not a mere breaking of the epidermis and a feeble flow of blood superinduced by a blow from the fist in an ordinary battery.

Comprehensively examined it is fairly manifest that section 4483 is a statutory "catch-all," designed to cover and forbid criminal acts, productive of hurt and harm to others where life was put in jeopardy whether such acts were done with or without malice; that is, whether done intentionally or by culpable negligence. Thus it was designed to supplement, and not to supplant other germane statutes, wherein the strict letter, for lack of specific averment, fell short of defining the acts which constitute the offenses aimed at in section 4483. It not only includes acts which in other jurisdictions are designated as "aggravated assaults," but also other acts, done with imputable but not express, malice, with or without an assault. It is not necessary under this section that there should be any actual injury, if the life of another be intentionally endangered (State v. Agee, 68 Mo. 264); nor that life be actually endangered if there be a wounding and disfiguring to the extent of inflicting, or from which great bodily harm ensues (State v. Nieuhaus, 217 Mo. 332); or obviously if there be a maiming, *or* a wounding, *or* a disfiguring *from which* great bodily harm ensues; provided, the circumstances are such that if death had occurred the tortfeasor would for his acts have been guilty of either murder or manslaughter. It is clear that an intentional assault whereby life is endangered, or whereby great bodily harm ensues is already fully covered by sections 4481 and 4482; that an intentional assault which produces a maiming or disfiguring in designated serious aspects, is likewise forbidden by section 4480, while a common assault and battery is covered by section 4485. But it is not so clear that assaults with deadly or dangerous instrumentalities resulting in wounding, maiming or disfiguring from which bodily harm, greater in degree than

a common battery, but lesser in degree than those denounced in sections 4482 and 4480 and lacking the specific purpose and malice of section 4481, are so included. It is clear that acts of culpable negligence, where injuries short of death are inflicted, are denounced by said section 4483; that the endangering of life intentionally, and that the infliction of great bodily harm either by wounding, or maiming, or disfiguring are also included. So the conclusion is deducible that the section denounces but two crimes: (a) the endangering of the life of another and (b) the infliction of great bodily harm, either by (1) wounding, (2) maiming, or (3) disfiguring. Any other view inevitably leads to the conclusion that the Legislature has done the unnecessary thing of making a single act punishable under more than one statute and of making two separate and distinct crimes out of the same act.

I am not contending that under the "aggravated assault" features of said section 4483 it is impossible to offend by an intentional battery committed with the bare fists. I am conceding, as in the beginning I forecast, the possibility of doing this under a proper information, present proper facts. But I do contend that there is neither such a pleading nor such facts here, and that absent such necessary concomitants, the ancient landmarks ought not lightly to be destroyed, merely because the acts of the defendant happen to be unusually reprehensible and the punishment richly merited.

But I pass to the second reason for my dissent, viz.,

the goodness *vel non* in a case like this
Instruction 7. of instruction seven, which reads thus:

"The court instructs the jury that *the law presumes that a person intends the natural and probable consequences of his acts*, and if you believe from the evidence in the case that defendant assaulted D. E. Tugel in a manner likely to cause death or great bodily

harm, the law presumes that he intended to kill him or do him some great bodily harm."

Here nothing was used but the fists, one of which bore a finger ring. Neither the fists nor the ring will be judicially noticed to be either a deadly or dangerous weapon as such is known to the law, absent specific proof of the fact. But in such state of the facts the jury are told that "*the law presumes that a person intends the natural and probable consequences of his acts.*" It has been said that in a criminal case the law raises no such presumption. [State v. Stewart, 29 Mo. 419, wherein the instrument of assault was a walking-stick.] In this case Judge NAPTON said: "But the instruction in reference to the intent of the defendant was calculated to mislead. The intent of the defendant in making the assault was a question of fact for the jury. The law raises no presumption about it, and it was error for the court to tell the jury that 'the law presumes that every man intends the natural, necessary, and probable consequence of his acts.'"

I do not contend that in a proper case the giving of a proper instruction involving the presumption of intent from the use of a deadly weapon upon a vital part of the body of him who is assaulted, is forbidden by law. But that is not the question here. The human fist, even when aided by a finger ring, is not judicially noticed as being a deadly weapon (Little v. State, 61 Tex. Crim. App. 197), and therefore its use could not be judicially noticed (and presumptions are necessarily bottomed on judicial notice), as being followed by the inevitable consequence of death or great bodily harm, for such consequences are neither the natural nor the probable *sequelae* of such use of the fist as it is ordinarily used in a battery. Such consequences are but remote possibilities, because in human experience they occasionally happen; they do not always happen; and we repeat, if the fist or the manner of the use thereof in this case was such as to take it out

of the category of ordinary use in a common assault and battery, the information ought to have said so. Moreover, if the jury were, even in this case to be told anything about presumptions, this instruction omitting the part which I am especially criticising, and which I italicise, told them all they were allowed to be told. The view urged in the majority opinion is fully met when the objectionable italicised words are entirely cut out of it. In short, these words were mere hurtful surplusage, even if we concede, for the sake of the argument, the correctness of the view on this point, of the majority opinion. Of course this instruction had specific reference to the first count, and not to the second count, on which the conviction was had, and which has been said to be a lesser offense. Though mindful of the excusing rule on this phase, I do not think it saved this error from being hurtful here, because it applied generally to the facts in the case, and was not a mere erroneous definition of a greater crime, than that of which defendant was convicted.

Coming to the third objection: Instruction three is bad because it is broader than the information. It would be bad in a civil case. How much worse then is it in a criminal case, wherein we are enjoined that, since the punishment of the citizen inflicts both pain and stain, rules of law in criminal cases are to be construed strictly. The pertinent part of the count in the information on which the conviction rests, charged that defendant "with a certain large finger ring and with his hands and fists, the said D. E. Tugel did then and there, beat, bruise and wound in and upon the head, neck and body of him the said D. E. Tugel, whereby the said D. E. Tugel was then and there greatly maimed, wounded and disfigured, and received great bodily harm."

The instruction which I contend is bad for a too-great broadness, in pertinent phrase read thus: "The court instructs the jury that if you find and believe

from the evidence that defendant, at the county of Audrain and State of Missouri, within three years next before the filing of this information in this cause did unlawfully and feloniously assault D. E. Tugel and did then and there strike and beat said Tugel in a manner likely to produce death or great bodily harm, and did then and there inflict on said Tugel great bodily harm, then you will find the defendant guilty as charged in the second count of the information in this cause and you will assess his punishment," etc.

If it be urged that this widening of the issues was harmless because of lack of evidence of other sources of injury besides the fists and the ring of defendant, the answer is that there is more than a suggestion in the evidence that the hardness of the ground on which Tugel lay contributed to some extent to the injuries which he is said to have sustained. This the majority opinion concedes, *arguendo*; yet the information did not charge it.

For these reasons and others which might be set forth but for the lack of space, I dissent from the majority opinion and the conclusion therein reached. *Woodson, C. J.*, and *Graves, J.*, concur in these views.

CITY OF ST. LOUIS, Appellant, v. ST. LOUIS,
IRON MOUNTAIN & SOUTHERN RAILWAY
COMPANY and REGAL BUGGY COMPANY.

Division Two, February 15, 1916.

1. **CONDEMNATION: Leasehold: Measure of Damages: Loss of Business: Expense of Removal: Depreciation in Value of Goods.** In the condemnation of land for a public use neither the lessee nor the owner is entitled to be compensated, as for damages, for the cost of the removal of a stock of goods from the land taken to another place and their installation there, nor for a depreciation in the value of the goods caused by

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their removal and reinstallation, nor for the loss of profits caused by an interruption of the business during the period of removal and its reestablishment. Such damages are so variant as to fall within the classification of speculative.

2. ———: ———: ———: **Fixtures.** In the condemnation of land the value of permanent fixtures, being such as may be considered a part of the real estate, is to be estimated as an element of damage; and the owner or lessee is entitled to be compensated for such trade fixtures as are contained in and affixed to the premises condemned. And under the apparent status of this case it is ruled that if the condemnor does not want such trade fixtures and the owner of the premises or the lessee elects to take them, the owner of the fixtures is entitled to be recouped in damages to the extent of their reasonable market value, as they stand, when confronted by the necessity of immediately tearing them out and reestablishing them elsewhere.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED AND REMANDED.

Charles H. Daues and *Truman P. Young* for appellant.

(1) The measure of damages in condemnation suits for land condemned is the market value of the land taken. *Lewis on Eminent Domain*, secs. 685, 706; *Cooley's Constitutional Limitations* (7 Ed.), chap. 15, p. 819. (2) In cases where land to be condemned is under lease the measure of damages in favor of the lessee is the market value of his lease over and above the rent reserved. *Lewis on Eminent Domain*, sec. 719; *Hughes v. Hood*, 54 Mo. 352; *Baltimore v. Rice*, 73 Md. 307. (3) Where land is condemned for public use there can be no allowance for damages for the cost of removing personal property or for injury to such property during the process of removal, or for interruption of business. This rule is applicable whether the land is occupied by the owner or by a lessee. *Railway v. Knapp-Stout & Co.*, 160 Mo. 396;

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Railroad v. Schweitzer, 173 Mo. App. 650; Railroad v. Porter, 112 Mo. 361; Cobb v. Boston, 109 Mass. 444; Lewis on Eminent Domain, sec. 727; In re Petition of New York v. Brooklyn Bridge, 4 N. Y. Supp. 222; Railroad v. Pierce, 35 Hun, 306; Edmunds v. Boston, 108 Mass. 549; Williams v. Commissioners, 168 Mass. 366; In re N. Y. W. S. B. R., 35 Hun, 636; Becker v. Terminal Ry. Co., 177 Pa. 253; Raulet v. Railroad, 62 N. H. 561. (4) In those cases where an allowance has been made for the cost of moving personal property or for interruption to business, the decision has been based upon peculiar provisions of the statutes or constitution, and such decisions recognized that the general rule in the absence of such provisions does not allow the recovery of such damages. Blincoe v. Railroad, 16 Okla. 286, 4 L. R. A. (N. S.) 890 and note. (5) The Missouri cases which have allowed damages for the removal of property have done so only in those cases where the condemnor would have had to pay the entire value of the property removed, if it were allowed to stay upon the land. In order to reduce the amount of damages it has been held that buildings and appurtenances found upon the land condemned may be removed and the cost of removal charged as a proper element of damages. Bridge Co. v. Schaubacher, 57 Mo. 582; Railroad v. McGrew, 104 Mo. 282; St. Louis v. Brown, 155 Mo. 567; Kansas City v. Morse, 105 Mo. 511; Railroad v. Clark, 121 Mo. 199. That these cases do not sustain the proposition that a lessee or owner may recover the cost of the removal of personal property or damages to business was clearly pointed out in the case of Railroad v. Schweitzer, 173 Mo. App. 650.

Rassieur, Kammerer & Rassieur for respondent.

(1) Section 21 of the Bill of Rights protects private property in personalty as fully as it does in real estate. Mo. Constitution, art. 2, sec. 21; Railroad v.

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McGrew, 104 Mo. 282; Bridge Co. v. Schaubacher, 57 Mo. 582; City v. Abeln, 170 Mo. 326; Monongahela Nav. Co. v. United States, 148 U. S. 312. (2) Under the Constitution of Missouri and the provisions of the charter of the city of St. Louis authorizing condemnation proceedings, the commissioners properly assessed as damages the cost of removing respondent's stock of goods and fixtures, the depreciation in value of its goods and fixtures caused by removal and reinstallation, and the injury to respondent's business caused by the interruption of same during the period of removal. City v. Abeln, 170 Mo. 326; Railroad v. McGrew, 104 Mo. 282; Bridge Co. v. Schaubacher, 57 Mo. 582; City v. Brown, 155 Mo. 545; Blincoc v. Railroad, 16 Okla. 286; Railroad v. Siegel, 161 Ill. 647; Railroad v. Heisel, 47 Mich., 399; Railroad v. Weiden, 70 Mich. 393; Railroad v. Getz, 113 Pa. 219; Printing Co. v. Railroad, 216 Pa. 504.

FARIS, P. J.—The city of St. Louis brought this action to condemn a strip of land for the western approach to its Municipal Bridge. Damages were assessed in favor of the several defendants by a commission of three freeholders, to whose report the city filed exceptions. The case came on for hearing in the circuit court of the city of St. Louis, wherein the exceptions of appellant city were overruled and it appealed.

The Regal Buggy Company, respondent herein, was the lessee for years of one parcel of the real estate which was condemned in this action. The lease of respondent, at the date of the making of the commissioners' report, had a little over three years to run. Specifically touching the land occupied by respondent the commission assessed the value of said land taken, plus the damages to the remainder of the parcel, at the sum of \$41,310. They then appor-

tioned this sum by allowing to the owner thereof \$38,610, and to this respondent, as lessee, the sum of \$2700, being the appraised value of its lease over and above the monthly rent reserved. After making allowances of damages aforesaid the commission allowed the respondent the further sum of \$8450 on account of injury to its business and for its damages and expenses arising from the removal of the fixtures and personal property of respondent from the premises condemned to a new location and for installing said property therein. The commissioners' report, which was approved by the circuit court upon exceptions taken thereto, states the specific elements of damages going to make up the last mentioned sum thus:

"(1) For the cost of removal of their several stocks of goods and fixtures from their present place of business to new locations and installing said goods and fitting said fixtures therein;

"(2) For depreciation in the value of such goods and fixtures caused by the removal and reinstallation of the same;

"(3) For injury to their said businesses caused by the interruption of the same during the period of removal of their said stocks of goods and fixtures."

The allowance of damages for the three items above enumerated is the sole matter of contention here. It is conceded, even, that if these three items were proper subjects of damages, then that the amount allowed respondent therefor is fair and reasonable, but appellant contends that under the law of eminent domain of this State no such damages may be paid by the condemner to him whose land is taken for public uses.

These three propositions and the contentions of appellant and respondent *pro* and *con* respectively, form the points up for decision.

OPINION.

As forecast there is no contention made by appellant that respondent as the owner of a lease for a term of years was not entitled to compensation therefor; nor that the amount of damages awarded as the market value of respondent's lease, to-wit, \$2700, is unfair or unreasonable. It is only the damages awarded for the three items set out in our statement herein that are in controversy.

I. For convenience of discussion we will consider all items or elements of damages together, except that

Damages In
Condemnation:
Loss of Business
Profits, Expense
of Removal and
Depreciation In
Value of Goods.

having to do with the fixtures, which we leave for subsequent separate discussion, since, under the law as we view it this may be conveniently done. In brief, these elements have to do with the allowance of damages

(a) for the removal of the stock of goods of respondent from the right of way taken to a new location and placing them therein; (b) for depreciation in the value of said goods, caused by such removal and re-installation, and (c) for injury to the business of respondent on account of the interruption or cessation thereof during the period of removal of said stock of goods and fixtures.

When this case was argued, the writer was of the opinion that it ought to be affirmed upon principle if not upon authority; but upon coming to examine the authorities I have been forced to a different view. Coming to the question of authority first, we have had our attention directed to but one case squarely on all-fours in favor of the allowance of damages for the expense of removal of personal property from the right of way condemned. That is the case of *Blincoe v. Railroad*, 16 Okla. 286, 4 L. R. A. (N. S.) 890. In the latter case the question of the allowance of such

expenses was squarely before the court and he whose lease was taken was adjudged entitled to expenses of removing certain personal property, to-wit, lumber, from the lands taken. In that case, however, the learned court admitted that the rule in other jurisdictions was contrary to the conclusion reached; but it held that the law in Oklahoma warranted a different holding because of the language of the statute of that State, which in substance required the commission *to consider the injury which the owner of the land might sustain and assess the damages caused him by reason of the appropriation of his lands.*

The case of Philadelphia & Reading Railroad Co. v. Getz, 113 Pa. St. 214, is urged upon us as announcing a rule in favor of the contention that damages of the sort here under discussion may be allowed; but that case did not deal with ordinary personal chattels, but apparently with machinery and fixtures. Besides, the Pennsylvania court, in the later case of Becker v. Railroad, 177 Pa. St. 252, held to the contrary, in that they held that it was proper to refuse to allow proof as to the expense of the removal from such land of the personal property of him whose land was being taken, and said that the expense of such removal could not be considered as an element of damages for the condemnation of real estate for public uses.

The case of Atchison, Topeka & Santa Fe Railroad Co. v. Schneider, 127 Ill. 144, is urged as an authority for the awarding of damages of the sort here under discussion. But we need not consider whether that case is an authority or not, for the reason that it was distinguished and practically overruled by the later case of Braun v. Railroad, 166 Ill. 434. So, we cannot see that respondent's contentions are at all aided by either of the above cases.

The case of Railroad v. Piel, 87 Ky. 267, is cited by respondent as an authority for a modicum of the position taken by it. This case seems to an extent to

bear out respondent's contention touching the phase of its right to damages for and during the interruption of its business caused by the taking of its property. We need not consider whether this is so or not, nor need we microscopically analyze the latter case, but pass it by, saying merely that it is opposed in its doctrine by the great weight of authority everywhere and in this State as well, and that in reaching the conclusion stated the learned court wholly overlooked and failed to consider the necessarily hypothetical and speculative character of such damages. [United States v. Wiener, 127 C. C. A. 1. c. 385.]

The rule announced by Mr. Lewis in his excellent work on Eminent Domain, is as follows: "While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and where a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part for the purpose proposed. The business conducted upon the property is not taken and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sake of the general good in which he participates. In a few instances the statute has expressly provided that compensation should be made for injury to business." [Lewis on Eminent Domain, sec. 727; Central Pacific R. R. Co. v. Pearson, 35 Cal. 247; Pause v. Atlanta, 98 Ga. 92, 58 Am. St. 290; Jacksonville & S. E. Ry. Co. v. Walsh, 106 Ill. 253; Chicago &

Evanston R. R. Co. v. Dressel, 110 Ill. 89; DeBuol v. Freeport & Mississippi River Ry. Co., 111 Ill. 499; Braun v. Metropolitan W. S. El. R. R. Co., 166 Ill. 434; Cook & R. Co. v. Sanitary District, 177 Ill. 599; Marshall v. Chicago, 77 Ill. App. 351; Sanitary District v. McGuirl, 81 Ill. App. 392; Whitman v. Boston & Maine R. R. Co., 3 Allen, 133; Cobb v. Boston, 109 Mass. 438; Pegler v. Hyde Park, 176 Mass. 101; Sawyer v. Met. Water Board, 178 Mass. 267; Bailey v. Railroad, 182 Mass. 537; Boston Elting Co. v. Boston, 183 Mass. 254; Nashua River Paper Co. v. Commonwealth, 184 Mass. 279; Railroad v. Knapp, Stout & Co., 160 Mo. 396; Railroad v. Continental Brick Co., 198 Mo. 698; Petition of Mt. Washington Road Co., 35 N. H. 134; Raulet v. Concord R. R. Co., 62 N. H. 561; Matter of Department of Public Parks, 53 Hun, 280, 25 N. Y. St. 9, 6 N. Y. Supp. 750; Van Buren v. Fishkill Water Works Co., 50 Hun, 448, 21 N. Y. St. 448, 3 N. Y. Supp. 336; Matter of Grade Crossing Comrs., 17 App. Div. (N. Y.) 54; Matter of Gilroy, 26 App. Div. (N. Y.) 314; Cincinnati Iron Stove Co. v. Cincinnati So. Ry. Co., 9 Ohio C. C. 103; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Navigation Co. v. Thoburn, 7 S. & R. 411; Pittsburgh & Western R. R. Co. v. Patterson, 107 Pa. St. 461; Hamilton v. Railroad, 190 Pa. St. 51; Schonhardt v. Pa. R. R. Co., 216 Pa. St. 224; Porter v. Scranton City, 36 Pa. Supr. Ct. 218; Fuller v. Edings, 11 Rich. 239; Eddings v. Seabrook, 12 Rich. 504; Railroad v. Chamblin, 100 Va. 101; Hunter v. Railway, 107 Va. 158; Studler v. Milwaukee, 34 Wis. 98; Esch v. Railroad, 72 Wis. 229; Union Steamboat Co., 39 Fed. 723; Bigg v. Corporation of London, L. R. 15 Eq. Cas. 376; Queen v. Vaughn, 4 L. R. Q. B. 190.]

In the case of *Pause v. Atlanta*, 98 Ga. 92, l. c. 105, the Georgia Supreme Court said: "The measure of her damages is the injury to her property which is injuriously affected by the public improvement; in arriving at that damage, neither the profits in the busi-

ness conducted on the premises, nor the cost to the tenant of the fixtures and improvements placed therein nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in value of fixtures, improvements or articles such as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate."

The general rule as regards including as elements of damages expenses of removal of personal property, as well as that regarding the status of fixtures, below discussed, is thus stated by Mr. Lewis: "Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself. Where a railroad was laid through premises which had been fitted up for a water cure, so as to render it unsuitable for that purpose, it was held that the owner was entitled to the difference between what the fixtures and appurtenances were worth in connection with the property as a water cure (not exceeding their reasonable cost) and what they were worth to be removed from the premises and applied to other purposes. In a case in Pennsylvania it was held proper to show the expense of removal of machinery and fixtures as bearing upon the value of the property as it stood. But the damages to personal property, or the expense of removing it from the premises, can not be considered in estimating the compensation to be paid. But when both parties proceed upon the theory that the owner is entitled to the cost of removing machinery, the condemning party cannot complain. Where the statute provided that the commissioners should 'inspect said real property and consider *the injury which such owner may sustain by reason of such rail-*

road; and they shall assess damages which said owner will sustain by such appropriation of his land,' it was held that the words in italics required that compensation should be made for the removal of personal property." [2 Lewis, Em. Dom., sec. 728, citing *Blincoe v. Railroad*, supra.]

But this matter has also been before our Missouri courts and if we are now to hold that respondent is entitled to damages for the three elements under discussion, we must of necessity overrule two Missouri cases wherein the point involved was squarely lodged and wherein it was held that no such compensation is allowable under our laws. [*Railroad v. Knapp-Stout & Co.*, 160 Mo. 396; *Springfield S. W. Ry. Co. v. Schweitzer*, 173 Mo. App. 650.] In the *Knapp-Stout* case, supra, at page 412, Judge GANTR, writing the opinion of the court, in defining the measure of damages, and touching the identical question of the allowance of damages of the sort here under discussion, said:

"It is the settled law of this court that the measure of compensation and damages in cases in which only a part of a tract is condemned, as in the case at bar, is the market value of the land taken for the right of way, and the damages to the remainder by reason of the railroad running through it, less any benefits that are peculiar to the tract of land arising from the running of the road through it. [*Bridge Co. v. Ring*, 58 Mo. 491; *Railroad v. Waldo*, 70 Mo. 629; *Railroad v. Story*, 96 Mo. 611; *Railroad v. Baker*, 102 Mo. 553.]

"Injury to business, loss of profits, inconvenience to the owner, damage to personal property or the expense of removing it, are not to be estimated as distinct elements of damages."

In the very late case ruled by the Springfield Court of Appeals practically all of the Missouri cases were examined and discussed, and such of them as seem upon casual glance to oppose the conclusion

reached, were successfully distinguished. Many of these cases are urged upon us as announcing a different rule, but we do not think they so far announce a different rule when carefully considered and when the precise point up for judgment is regarded, as to warrant us in overruling those on all-fours; *a fortiori*, when they but follow the overwhelming weight of the authorities upon these questions everywhere. Since all of these cases have been so lately, fully and ably discussed in *Railroad v. Schweitzer*, *supra*, we need not take up space to consider them again.

In the *Knapp-Stout* case, *supra*, precisely the same question was before this court that was before the Oklahoma court in the *Blincoe* case, viz.: the question of whether he whose land was taken for public uses could recover the expenses necessarily incurred in the removal of personal property from the land, to-wit, lumber, lying thereon. In both cases parts of lumber yards were taken, yet we ruled that such expenses were not proper elements of damages.

At first glance it is to be conceded that there exists a difficulty in finding a reason for not compensating the owner of personal chattels who is compelled to remove them, for his expense in so removing them to a point at least, beyond the edge of the right of way. It is equally clear, on the other hand that no logical reason can be found for compensating him for the expense of removal beyond such point. This is so, for the reason that A might desire to move his chattels only into the next adjoining house, while B might desire to have his taken several blocks, or even several miles, and C on the other hand, his business being broken up, might desire to remove his goods to some other place, or city. No reason in logic therefore can be found for the condemner's paying more than is sufficient to move the personal property off the right of way. A rule which would require the condemner to do more

would be variant and indefinite, and therefore speculative.

It is obvious that a lessee stands in no better condition touching his right to be compensated for expenses of this sort than does the owner of the fee. In fact, the reasons are more cogent for permitting the owner of the fee to recover as damages expenses of this sort than they are in favor of the lessee. For the lessee may be compelled to move at the end of his term; and since his occupancy of the premises is founded on contract, it may even be said that the presumption is that he will move. Or if there be no such presumption, or no presumption either way, the lessee is not aided by a discussion of this moving matter, for arguments in his favor in this behalf are founded upon the presumption that he will renew his lease and remain at the end of his term. But as regards the owner whose lands are taken, no requirement exists for his removal at any time, unless he sells the premises—a contingency too remote for consideration in this connection.

We apprehend that back of the rule against allowing damages of this nature also lie the considerations that loss of profits during removal is necessarily so speculative as to afford as a measure of computation no rule except a mere guess; that likewise, beyond the mere moving of goods to a point just outside the bounds of the right of way condemned, the expenses of removal being variant, damages would be arbitrary and highly speculative, and removal but to a point only just beyond the edge of the right of way would fall into the category *de minimis*, and that moreover, the inclusion of expenses of removal of personal property and compensation for loss of profits during removal, is merged and included in the price paid for the easement to the owner, or to the lessee, as the case may be. Viewed as a forced purchase by the public for the pub-

lic good, as a condemnation action is in the last analysis, the latter consideration seems of great weight. For if he whose land is condemned had voluntarily sold his land to a private purchaser, ordinarily no thought would occur to either one, absent agreement to that end, that the seller should be compensated by the buyer for the removal from the sold premises of mere personal goods and chattels. That one is a voluntary sale and the other an involuntary sale does not peculiarly detract from the force of the argument.

But be all these things as may be the overwhelming weight of authority both in this State and in all other jurisdictions is as we hold, and having had other views in the beginning, by reason of the apparent, rather than real, crying equities in the case, we have yet been compelled to follow the law as it is written both here and elsewhere. To rule otherwise would necessitate the overruling of at least two Missouri cases squarely in point and of most carefully distinguishing three or four other cases. [Railroad v. McGrew, 104 Mo. 282; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Railroad v. Porter, 112 Mo. 361.]

We therefore hold, in consonance with the great weight of authority everywhere, that respondent was not entitled to recover for loss of profits in its business during the removal of its stock of goods; nor for the expense of the removal of its stock of goods and personal property, as contradistinguished from fixtures, from its old location which was condemned, to a new location; nor for the depreciation in value of such personal property and stock of goods, caused by such removal and re-installation.

II. What we have said above disposes of a part of the questions involved in contention (1) *supra*, that is to that part of this contention having to do with the cost of the removing of mere personal property

and chattels. The other phase of the case mooted in both contentions (1) and (2) viz; that touching the cost of removal of trade fixtures, which we left over for subsequent separate discussion, presents a somewhat different question. We assume, of course, nothing further appearing, that the word "fixtures" is used in its legal and technical sense, and not as a mere mercantile designation applied to chairs, tables, iron safe, *et id omne genus*.

A fixture appertains to the real estate itself, which real estate to the extent, at least, of an easement therein, is being taken by condemner. We need not enter into any intricate discussion of fixtures (since such a discussion does not belong here), for the reason above given, which is well-settled, to-wit: that a trade fixture such as is herein involved, and such as was to an extent involved in the case of *Hannibal Bridge v. Schaubacher*, supra, is a part of the realty; and since it passes ordinarily as between vendor and vendee, upon a voluntary sale, we see no reason why it should not pass to the condemner upon an involuntary transfer, such as this is. We find nothing in the Missouri cases, nor in the cases from other jurisdictions which seriously militates against this view. Those mentioned below sustain it. It seems to be right on principle; to do full justice and afford full compensation.

In passing we may say *arguendo*, that the view that the owner should be compensated for the expense of tearing out, moving and re-installing fixtures in another location has much of logical cogency. But it seems out of consonance with our own rulings, and subject to the objection that the expense of carriage from the old to the new location would be speculative, and so having reached a view which affords full compensation for the injury done, we hesitate to overrule our former holdings. Many of the cases from

other jurisdictions which have been urged upon us as sustaining all of respondent's contentions, are cases which allowed compensation for removing and re-installing fixtures, and ruling that such compensation was permissible. This for the reason, that if the owner of the land or lease condemned take such fixtures off the hands of the condemner, who, ordinarily, does not want them, thus minimizing the damages accruing, both the owner and the condemner ought to be held to the rule that their reciprocal duty toward each other is to so act as not unduly to augment the damages arising from the appropriation of the land.

In a very late case, decided in the United States Circuit Court of Appeals for the Second District, it was held that an award in a condemnation proceeding for the value of certain trade fixtures, to-wit, machinery of an engraving plant, was proper, the court holding that in condemnation proceedings where the land is taken in *invitum*, the rule which obtains as to such fixtures is analogous to that between vendor and vendee and not that between landlord and tenant. [United States v. Wiener, 127 C. C. A. 382.] In the latter case the court quoted with approval what was said in *In re Block Bounded by Avenue A*, 122 N. Y. Supp. 321, l. c. 339, wherein it was ruled:

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

In the above case of *United States v. Wiener*, the court upon the other phases of this case, discussed supra, says: "There seems to be no authority for an allowance for the removal of the business as distinguished from the plant and machinery. The district court allowed \$2500 as damages which may result from the change of location. This was based upon hypothesis and speculation and we are unable to find any controlling authority to support the award."

Since houses, which are but fixtures to real estate, pass to the condemner (*Kansas City v. Morse*, 105 Mo. l. c. 519), and since trade fixtures under the vendor and vendee rule would pass to the buyer, they pass here to the condemner and it must pay for them. Respondent, absent an election on its part and consent of the city to that end, could not take fixtures which the city had condemned, nor obtain as damages pay for moving property which by condemnation became that of the city. [*Kansas City v. Morse*, 105 Mo. l. c. 519; *Springfield S. W. Ry. Co. v. Schweitzer*, 173 Mo. App. 650.]

It follows from all this that respondent was entitled to be paid the reasonable market value of its fixtures (contra-distinguished from mere goods and chattels) which were contained in, and affixed to the leased premises condemned. But the apparent present status of the instant case causes us to further rule, that if appellant does not want these fixtures, and respondent elects, or has elected, to take them (or, as seems probable, has already taken them), then damages which appellant will be held to pay as such value of them should be recouped to the extent of their reasonable market value, as they stood in their old location, when confronted, however, as diminishing such value, by the necessity of immediately tearing them out and re-installing them elsewhere.

Upon the other phases of the case and to the extent last discussed upon the latter one, we are of the

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opinion that the court erred, and that for such error this case must be reversed and remanded to be retried in such wise as is not inconsistent with the views herein expressed. Let this be done. All concur.

THE STATE ex rel. MOBERLY SPECIAL ROAD DISTRICT, Appellant, v. G. R. BURTON et al., Judges of County Court, Appellants.

Division Two, February 15, 1916.

1. **CONSTITUTIONAL STATUTE: Implied Legislative Limitation.** An implied limitation on the Legislature's power to enact a certain statute must be so clear and unmistakable as to make possible no other reasonable construction of the language used than that the power to enact the statute does not exist. A possible inference of its non-existence is not sufficient.
2. ———: ———: **Twenty-five Cent Road Tax: Expended by County Court.** The provision of section 11 of article 10 of the Constitution authorizing the county court to levy and collect a tax of not more than twenty-five cents on each hundred dollars' valuation, to be used for road and bridge purposes, and for no other purpose whatever, does not give the county court exclusive power to expend the fund, and does not contain a limitation upon the power of the Legislature to authorize the money so raised to be expended by the commissioners of a special road district so clear and unmistakable as to justify the conclusion that such power does not exist.
3. ———: ———; **Expended by County Court: Administration of County Affairs.** Section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is not unconstitutional on the theory that the Constitution created county courts to transact the business of the counties and vested them with express jurisdiction to construct and repair roads, even though it contains an implied limitation that the road tax fund be expended under the direction of those courts.
4. ———: **Legislature: Power of Taxation: Instrumentalities.** The power to tax and to appropriate taxes is vested in the Legislature, and may be exercised within its discretion when

not violative of an express provision of the Federal or State Constitution, and that power, in the absence of such restrictions, extends to a determination of the time, the amount, the nature and the purpose for which the tax is to be levied, and the creation of the agencies or instrumentalities for its collection and disbursement.

5. ———: **Class Legislation: Special Road Districts.** Sections 10594 and 10591, Revised Statutes 1909 (repealed and reenacted in 1913, Laws 1913, pp. 674, 675), are not unconstitutional as class legislation. They apply to all road districts which may be organized as bodies corporate and are conducted in conformity with their provisions.
6. ———: ———: ———: **Indefinite Territory.** The fact that much or little of the territory of the county may be included in a special road district does not render invalid the statutes authorizing their organization.
7. ———: **Special Road Districts: Public Purpose.** Taxes expended by a special road district on public highways are used for a public purpose.
8. ———: ———: **Uniform Taxation.** Special road district statutes operate alike upon all persons within the district, and do not violate the rule for uniformity of taxation.
9. ———: ———: **Collection of Taxes Within Cities.** The statutes, in authorizing the levy and collection of taxes in special road districts outside of cities, do not violate that part of section 10 of article 10 of the Constitution which forbids the Legislature to impose taxes and appropriate money levied and collected by city authorities to uses and purposes outside of such cities.
10. ———: ———: **Lending Credit, Etc.** The statutes creating and governing special road districts do not violate sections 46 and 48 of article 4 of the Constitution which prohibit the Legislature from granting public money to individuals, or municipal or other corporations, and from authorizing any municipality or other political corporation from lending its credit in aid of any individual or corporation.
11. ———: ———: **Maximum Rate of Taxation.** Special road districts are not included within the provisions of sections 11 and 12 of article 10 of the Constitution which fix the maximum rates of "taxes for county, city, town and school purposes."

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller*, Judge.

AFFIRMED.

Willard P. Cave for relator.

(1) The law passed by the General Assembly, authorizing and directing the payment of special road and bridge funds to the incorporated special road district is valid, and within the legal rights of the Legislature to enact such law. Sec. 10482, R. S. 1909, as amended by Laws 1913, pp. 669, 670; *Harris v. Bond Co.*, 244 Mo. 664; *State ex rel. v. Sheppard*, 192 Mo. 506; *State ex rel. v. Warner*, 197 Mo. 656; *Ex parte Roberts*, 166 Mo. 212; *Cass County v. Jack*, 49 Mo. 196; *Dillon on Municipal Corporations* (5 Ed.), sec. 92, p. 142, sec. 108, p. 181; *Williams v. Eggleston*, 170 U. S. 310; *Elting v. Hickman*, 172 Mo. 237; *State ex rel. v. County Court*, 128 Mo. 427; *Road District v. Embree*, 257 Mo. 593. (2) The amendment of the Constitution in 1908 (Sec. 22, art. 10) does not limit the power of the Legislature to designate the agency through which the taxes collected shall be expended, provided same are used for the purposes limited in the constitutional amendment; in other words, the constitutional limitations are merely upon the uses and purposes to which the special fund may be put, and is not a limitation upon the power of the Legislature to designate the agency through which such uses and purposes shall be accomplished. *Elting v. Hickman*, 172 Mo. 237; *Harris v. Bond Co.*, 244 Mo. 687. (3) The discretionary power to levy the taxes is vested in the county court, but the appropriation of the funds derived therefrom is not the county's business. *Railroad v. Marion Co.*, 36 Mo. 303; *State v. County Court*, 34 Mo. 546; *Barton County v. Walser*, 47 Mo. 189; *Ray County v. Bentley*, 49 Mo. 236; *Express Co. v. St. Joseph*, 66 Mo. 680; *Glasgow v. Rouse*, 43 Mo. 479; *Railroad v. State Board of Equalization*, 64 Mo. 294; 37 Cyc. 724; *Thomas v. Gay*, 169 U. S. 264. (a) The taxing power is not granted by the Constitution, but is inherent in the Legislature. Unless the Consti-

tution expressly forbids the Legislature has the absolute power to assess property and levy taxes, and provide the general scheme by which to carry out such purpose. In re Sanford, 236 Mo. 684. (b) Since there are no constitutional restraints placed upon the Legislature, the State has the power to create such agencies as the Legislature may deem fit and proper for the collection of its revenue. In re Sanford, 236 Mo. 684; St. Louis v. McCann, 157 Mo. 307. (4) The act of the General Assembly of 1913, being the amendment to section 10482, which requires the counties in which there is a special road district to pay such districts the funds raised from the property in such districts, by virtue of a levy of taxes, under section 22, article 10, of the Constitution, is not in conflict with the constitutional provision, and is a valid act of the Legislature. Express Co. v. St. Joseph, 66 Mo. 680; Elting v. Hickman, 172 Mo. 237; State ex rel. v. County Court, 128 Mo. 427; Harris v. Bond Co., 244 Mo. 664; Road District v. Embree, 257 Mo. 593.

Jerry M. Jeffries for respondents.

(1) Any law passed by the General Assembly authorizing or directing the payment of public funds secured by taxation to an incorporated special road district, is in violation of the Constitution and void. Constitution, art 9, secs. 46 and 47; State ex rel. v. St. Louis County, 142 Mo. 575; State ex rel. v. St. Louis, 216 Mo. 89; State v. Curators, 57 Mo. 178. (2) The funds derived from the levy made under section 22 of article 10 of the Constitution are public funds collected for a special purpose. Green City v. Martin, 237 Mo. 274; State ex rel. v. County Court, 142 Mo. 576. (3) The levy of taxes and the appropriation of the funds derived therefrom is the county's business. An act of the General Assembly which requires the county court to pay a part of a fund collected for a particular purpose to the commissioner of a special

road district, is void because it takes from the county court its constitutional right to transact all county business. Constitution, art. 6, sec. 36; State ex rel. v. Shepherd, 177 Mo. 205. (4) All of the county must be under township organization or none. To so organize requires a vote of the people of the entire county. Constitution, art. 19, sec. 8. (5) Constitutions are instruments of practical nature to be construed with the help of common sense to carry out the intent. In construing them it is proper to consider the consequence of the proposed construction, the circumstances and conditions of the people who adopted them. State ex rel. v. Callegin, 172 Mo. 129; State ex rel. v. County Court, 34 Mo. 549; Railroad v. Evans, 85 Mo. 370; Kenefick v. St. Louis, 127 Mo. 1; Water Co. v. City of Lamar, 128 Mo. 188; Test Oath Cases, 41 Mo. 188. (6) Under the Constitution, article 10, section 12, the counties are required to keep within the revenues of each year, with their expenditures of that year. Andrew County ex rel. v. Schell, 135 Mo. 38; Trask v. Livingston County, 210 Mo. 582. (7) The act of the General Assembly of 1913 requires the counties of this State in which there is a special road district, to pay to such special district the funds raised from the property in such special district by virtue of a levy of taxes under section 22 of article 10 of the Constitution, and Sec. 10482, R. S. 1909, is in conflict with such section of the Constitution and void. State ex rel. v. St. Louis County, 34 Mo. 548; Railroad v. Evans, 85 Mo. 370; Kenefick v. St. Louis, 27 Mo. 1; Water Co. v. City, 128 Mo. 188; Hamilton v. St. Louis, 15 Mo. 3; Green City v. Martin, 237 Mo. 477; State v. Curators, 57 Mo. 178; State ex rel. v. St. Louis, 216 Mo. 94; State ex rel. v. Everett, 245 Mo. 706; Lamar v. City of Lamar, 169 S. W. 12.

WALKER, J.—The city of Moberly and contiguous territory in Randolph County for a distance of

four miles in each direction from said city, was, under the authority of sections 10576-10586, Revised Statutes 1909, as amended by Laws 1911, p. 370, organized as a body corporate, to be thereafter designated as the "Moberly Special Road District." This action by mandamus was brought in the circuit court of said county by the State at the relation of said road district as plaintiff against the judges of the county court of Randolph County as defendants, to compel the latter to pay over (under the provisions of Sec. 10482, R. S. 1909, as amended by Laws 1913, p. 669) to said road district all money arising from a twenty-five-cent levy for road and bridge purposes collected on the property within said district. The levy, however, was made upon all the property of the county. The total fund collected in said district under said levy for road and bridge purposes, was \$9334.60. In anticipation of the revenue to be derived from said twenty-five-cent levy, defendants had caused work to be done and debts to be contracted for roads and bridges over the entire county and had issued warrants therefor.

Upon a hearing on the application for the writ of mandamus the circuit court found that defendants had issued warrants in said district for \$3303.90 for work done therein, and it was ordered that they pay or issue warrants to plaintiff in the sum of \$6030.70, or the balance remaining in the county treasury which had been collected in said district under the twenty-five-cent levy.

Cross appeals were perfected from this judgment, plaintiff contending that it was entitled to the entire revenue collected in said district for the preceding year for road and bridge purposes, and defendants that the statute under which the levy was made was unconstitutional and hence void.

The constitutionality of section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), provid-

ing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is assailed by defendants on various grounds. It is first contended that this statute violates section 22 of article 10 of the State Constitution. It will be recalled that this section provides in addition to taxes authorized to be levied for county purposes (under Sec. 11, art. 10, Constitution), that the county courts of the several counties, not under township organization, and the township board of directors in counties having township organization, may levy and collect as State and county taxes are collected, a special tax of not more than twenty-five-cents on each one hundred dollars' valuation, to be used for roads and bridges, but for no other purpose whatever, and the power thus conferred on the county courts and township boards is declared to be discretionary.

Three limitations, two express and one implied, say defendants, are found in this section; the first is as to the rate, the second as to the application of the tax when collected, and the third (which defendants say is implied) that the tax must be expended under the direction of the county court over the entire county.

As to defendants' contention in regard to the first and second limitations, there is no question, the Constitution in this regard being express and unequivocal. As to the third, it may be con-

Implied
Legislative
Limitation.

ceded as a general proposition that under section 36 of article 6 of the State Constitution county courts are created for the transaction of county business and express jurisdiction is given them in this regard, but it must be borne in mind, despite this provision, that our organic law is not like the Federal Constitution, a grant of power, but is simply a limitation upon power which the Legislature otherwise possesses. [McGrew v. Railroad, 230 Mo. 496; State ex rel. v. Sheppard, 192

Mo. 497; State ex rel. v. Warner, 197 Mo. 650; Glasgow v. Rowse, 43 Mo. 479.] Broadly stated, therefore, the Legislature may enact any law which does not contravene the Federal or State Constitution, and in its interpretation, the courts will hold it valid unless its unconstitutionality is manifest and exists beyond a reasonable doubt. [State v. Buente, 256 Mo. 227; Board of Com. v. Peter, 253 Mo. l. c. 530; Harris v. Bond Co., 244 Mo. 664; State ex rel. v. County Court, 128 Mo. 427.] The admitted implied existence of the third limitation renders it necessary for same to be so clear and unmistakable as to leave no other reasonable construction than that insisted upon by defendants, otherwise their contention cannot be maintained. [Board of Com. v. Peter, 253 Mo. l. c. 530.]

It is only upon the assumption that the entire business of the county must be conducted by the county court and that the Legislature cannot provide otherwise, that any basis can be found for defendants' contention as to the third limitation. No words in the section authorize it. Consequently it is not such a clear and unmistakable implication as would, under the rule, authorize an affirmative conclusion as to its existence in harmony with defendants' contention, but on the contrary, it is simply an inference. Constitutional provisions cannot be construed by inferences, especially when it is sought by such construction to render a legislative enactment invalid. In thus construing the section of the Constitution under consideration, we are not unmindful of the fact that it contains restrictive language, but the purpose of this language is unmistakable and is expressly limited to the amount of the levy on each \$100 valuation, and the purpose for which the tax is to be used, and not to the officials or body corporate by which it is to be expended. We are not impressed, therefore, with the soundness of defendants' reasoning in so construing section 22, article 10, of the Constitution, as to con-

fine the disbursement of the taxes therein authorized to the county courts of the respective counties, the effect of which would be to render invalid section 10482, Revised Statutes 1909, as amended.

A fitting supplement to what has been said, and one of the primary principles underlying the system of taxation, is the fact that the inherent power to tax and to appropriate taxes is vested in the Legislature (Art. 10, Constitution) and may be exercised within its discretion when not violative of an express provision of the Federal or State Constitution. [Hann. & St. J. R. R. Co. v. State Board, 64 Mo. 294.] The comprehensiveness of this power, in the absence of the restrictions indicated, extends to the determination of the time, the amount, the nature and the purpose for which the tax is to be levied. [In re Sanford, 236 Mo. l. c. 684; 37 Cyc. 724, and cases.] The legislative power to tax being inherent, the creation of agencies or instrumentalities for the levy, collection and disbursement of such taxes follows as a necessary consequence, and hence the right of the Legislature to enact a law delegating, in this case, the disbursement of the taxes collected to a board of commissioners of a special road district, is not an improper exercise of such power.

In addition to assailing the validity of section 10482, as amended (Laws 1913, p. 669), as being in conflict with section 22 of article 10 of the State Constitution, defendants claim that section 10594, Revised Statutes 1909, as repealed and re-enacted in 1913 (Laws 1913, p. 675), concerning, among other things, funds to be used in special road districts and the apportionment by county courts of county taxes for road and bridge purposes upon property within such special road districts, and section 10591, Revised Statutes 1909, as repealed and re-enacted in 1913 (Laws 1913, p. 674), providing, among other things, that boards of commis-

Power of
Taxation.

Class
Legislation.

sioners in special road districts may contract for the building, repair and maintenance of bridges and culverts in such districts and that county courts may in their discretion assist in same, are each, as well as section 10482 as amended, invalid as special legislation.

The particular provisions of the Constitution (Sec. 53, art. 4) prohibiting this character of laws are not pointed out. The Constitution does not prohibit local or special laws in all cases, such laws being forbidden only upon the subjects named in the Constitution or where a general law could have been made applicable (State ex rel. v. Speed, 183 Mo. 186). What are general laws as meant by the Constitution has been frequently determined. It is held: generally that a statute is not special or class legislation if it applies to all alike of a given class, provided the classification is not arbitrary. [Miners' Bank v. Clark, 252 Mo. 20; State ex rel. v. Taylor, 224 Mo. 393.] Applying this rule to the statutes under review, we find from their terms that they apply alike to all road districts in the State which may be organized as bodies corporate and are conducted in conformity with the provisions of these acts. It does not matter whether much or little of the territory of a county is included in the districts thus organized; the test of validity being, is the class created by these acts not arbitrary, and is each of the districts subject to and governed by these statutes? If so, then they are not inimical to the constitutional provision in regard to special or class legislation. In our opinion they comply with the requisites of general laws and should be so construed. We so held in construing a similar statute in Elting v. Hickman, 172 Mo. l. c. 256, and in State ex rel. v. County Court, 128 Mo. 427.

There is no merit in the contention that the acts referred to are violative of that constitutional provi-

sion (Sec. 3, art. 10, Constitution) which prohibits the Legislature from appropriating public money for private purposes. These statutes were enacted to authorize the construction and provide for the maintenance of highways, which are for the use and benefit of the public, and under no rule of construction can the appropriation of money for this purpose be considered a private one.

It is also urged that the provision of our organic law requiring uniformity in taxation is violated by these statutes. We have adverted to the power of the Legislature in regard to taxation; with it rests the mode of levying, collecting and disbursing taxes. Therefore, where statutes relative thereto operate alike upon all persons within a certain defined district or subdivision of the State, for example these special road districts, and the taxes authorized are for the benefit of the inhabitants thereof, as well as the general public, they are not open to the objection of non-uniformity in taxation.

Under section 10, article 10, of the Constitution, the Legislature is forbidden to impose taxes and appropriate money levied and collected by city authorities to uses and purposes outside of such cities. It is claimed that the statutes under review, in authorizing the levy and collection of taxes in these special districts outside of such cities, violate this constitutional provision. It is held to the contrary in *Elting v. Hickman*, 172 Mo. l. c. 258, on the ground primarily of the plenary power of the Legislature in the absence of express constitutional inhibitions, and secondarily, and as a practical reason, the interest of such cities in the improvement and maintenance of the roads leading thereto.

It is further claimed that section 46 of article 4 of the Constitution prohibiting the Legislature from granting public money to individuals, municipal or other corporations, and section 47 of article 4 of the Constitution prohibiting the Legislature from authorizing any municipality or other political corporation from lending its credit in aid of any individual or corporation, are violated by the statutes under consideration. These statutes do not grant or authorize the granting of public money or thing of value to any individual, association, municipal or other corporation, and they are therefore not violative of section 46 supra. [State ex rel. v. County Court, 128 Mo. 427.] Nor do the acts authorize any subdivision of the State now existing or that may be established to lend its credit or grant public money or thing of value in aid of any person, firm or corporation. Section 47, supra, is, therefore, not violated. This has been fully determined in *Eltling v. Hickman*, supra, in which the statute there under review is, in all of its essentials, similar to these at bar.

It is urged that the acts in question are in violation of sections 11 and 12 of article 10 of the Constitution, which fix the limit of tax rates in the various counties. The limitations of said sections are confined by their express terms to "taxes for county, city, town and school purposes." There is no authority for including road districts therein. We have held that they are not to be so included. [*Lamar W. & El. Light Co. v. Lamar*, 128 Mo. l. c. 216; *Harris v. Bond Co.*, 244 Mo. 664.]

The power of the Legislature in the creation of municipalities and public corporations of every description is not only absolute but unlimited in the absence of constitutional inhibitions. In the presence of this power we must presume that in the creation of the special road districts the Legislature deemed them necessary, expedient and in the public interest. Thus

formed, authority exists as a necessary consequence of legislative power, to provide means for their perpetuation or maintenance or their change or abolition, as in the wisdom of the Legislature seems best. [Harris v. Bond Co., 244 Mo. 664.]

In view of all of the foregoing, we hold that the statutes in question do not, within the meaning of the Constitution, authorize the granting of public money to a corporation, nor do they interfere with the transaction of a county's business required to be exclusively performed by a county court, nor do they involve a going into debt by counties as prohibited by the Constitution or authorize the expenditure of public money for another purpose than that for which it was collected, nor conflict with either the letter or spirit or the intent and purpose of section 22 of article 10 of the Constitution of this State.

From all of which it follows that the judgment of the circuit court is affirmed, and it is so ordered. *Faris, P. J.*, concurs; *Revelle, J.*, not sitting.

THE STATE v. WILLIAM YOUNG, Appellant.

Division Two, February 15, 1916.

1. **FALSE PRETENSE: Information.** An information which plainly alleges (1) what the pretenses were, (2) to whom they were made, (3) that he to whom they were made relied upon them and, acting upon such reliance, was induced to and did part with his property, (4) that by means of such pretenses said property was obtained, (5) that the property so obtained was owned by the person named, (6) that its value was a named sum, (7) that said pretenses were made by defendant designedly and feloniously with intent to cheat and defraud, and (8) that said pretenses were false, and that defendant knew they were false when he made them, states the component elements of the offense denounced by Sec. 4565, R. S. 1909, as amended by Laws 1911, and is sufficient.

2. ———: ———: **Misjoinder of Offenses: Different Statutes: Tests: Bar.** The legal test of permitted joinder of offenses is not whether the offenses charged in different counts of a single information as having been committed in different ways are, or are not, defined and denounced by different sections of the criminal code, but whether such offenses arose out of the same transaction, and are so far cognate that an acquittal or a conviction of the one would be a bar to a trial for the other.
3. ———: **Instruction: Under Abandoned Count.** An instruction in a prosecution for obtaining property by false pretense may be good under Sec. 4765, R. S. 1909 (as amended in 1913), but not good under Sec. 4565, R. S. 1909 (as amended in 1911); and if the information contains two counts, one charging a crime under section 4565, and the other, a crime under section 4765, and the later count is abandoned, an instruction bot-tomed on section 4765 and possibly good when tested by it, is bad if it does not meet the requirements of section 4565.
4. ———: ———: **Deception.** Instructions, in a prosecution for the false pretense denounced by Sec. 4565, R. S. 1909 (as amended in 1911), must require that the person alleged to have been defrauded was deceived by the false pretenses made by defendant; and if they do not contain such a requirement, a conviction under that statute cannot stand.
5. ———: **Deception: Knowledge of Falsity.** If the person al-leged to have been defrauded knew at the time that defend-ant's pretenses were false, no crime was committed under sec-tion 4565, Revised Statutes 1909.
6. ———: **Promise to Pay: Bank Check.** If at the time defend-ant offered his check on a certain bank in payment for the mules, the seller was informed that defendant had no funds in that bank, but defendant promised that by the time the check reached the bank the money to pay it would be there, and the check was accepted under such circumstances, no con-viction under section 4565 can stand; for the effect of an agree-ment to have the money in the bank to the pay the check on a future day, was to make of the alleged pretense but a mere promise, and so remove it from the category of crimes.
7. ———: ———: **Made In Good Faith.** Nor need the promise to pay at a future date be made in good faith; for the moment the alleged false pretenses are shown to be naked future prom-ises, the prosecution under section 4565 inevitably and in-stantly fails.
8. ———: **Evidence of Similar Acts: Instruction: Intent.** Where the information charges the false pretense to be that defend-ant gave in payment for mules a check on a bank in which he had no funds, it is proper to permit the State to prove that

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other checks drawn on the same bank, shortly before or shortly after the offense charged, were, to defendant's knowledge, refused payment for lack of funds, but in such case the jury should be instructed that proof of such other recent and similar crimes is admitted for the sole purpose of showing the intent of defendant in giving the check complained of.

Appeal from Callaway Circuit Court.—*Hon. David H. Harris*, Judge.

REVERSED AND REMANDED.

J. R. Baker for appellant.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) The first count of the amended information upon which the prosecuting attorney elected to try the defendant, properly charges the offense of obtaining money under false pretenses. *State v. Shout*, 263 Mo. 360; *State v. Roberts*, 201 Mo. 710; *State v. Lovan*, 245 Mo. 524; *State v. Martin*, 226 Mo. 547; *State v. Donaldson*, 243 Mo. 465; *State v. Foley*, 247 Mo. 607; Sec. 4565, R. S. 1909. (2) In a prosecution for obtaining money under false pretenses, evidence of similar transactions, whether prior to or subsequent to the one under review, is admissible as tending to prove a common intent of the defendant to cheat and defraud. *State v. Roberts*, 210 Mo. 726; *State v. Wilkins*, 221 Mo. 444; *State v. Shout*, 261 Mo. 360.

FARIS, P. J.—The defendant was convicted in the circuit court of Callaway County for violating the provisions of section 4565, Revised Statutes 1909, as amended by the Laws of 1911. [Laws 1911, p. 194.] His punishment was fixed by the verdict of a jury at imprisonment in the penitentiary for a term of two years. From a sentence in accordance with

the verdict, after the conventional motions, he has appealed.

The information is in two counts. The first count is bottomed as stated above, upon section 4565, and, caption and formal parts omitted, reads thus:

“N. T. Cave, Prosecuting Attorney within and for the body of the county of Callaway and State of Missouri, under his official oath and according to his best information, knowledge and belief, informs the court that one William Young, on the 16th day of April, 1914, at Callaway county, Missouri, feloniously, designedly and wilfully, with intent to cheat and defraud one I. L. Edwards, did falsely pretend to the said I. L. Edwards that he, William Young, had lawful money of the United States deposited to his credit in the ‘Bank of Chamois,’ a banking corporation duly incorporated, organized and operating as such under the laws of the State of Missouri, and that said money was subject to be checked out of said bank, and that he had sufficient money deposited in said bank to purchase and pay for two mules of the value and purchase price of four hundred and seventy-five dollars, and the said William Young further falsely pretended and represented to the said I. L. Edwards that he, William Young, was the owner and operator of the largest general merchandise store in the town of Chamois, Missouri, and the said I. L. Edwards, believing the said false pretense, made as aforesaid, to be true, and being deceived thereby, was by reason thereof induced to and did then and there sell and deliver to the said William Young, two mules, the personal property of I. L. Edwards, for the purchase price of four hundred and seventy-five dollars, and the said William Young gave the said I. L. Edwards his, William Young’s, personal check for the above amount drawn on the ‘Bank of Chamois,’ in payment for said mules and the said I. L. Edwards relying upon the statements so made by the said William Young, and believing them and each of them to be

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true, then and there accepted said check in payment of the purchase price of said mules and delivered the said mules to the said William Young, and the said I. L. Edwards presented the said check for payment at the 'Bank of Chamois,' Missouri, and the payment was refused because the said William Young had no funds in said bank, and the said William Young, by means of the said false pretenses so made to the said I. L. Edwards as aforesaid, unlawfully and designedly and feloniously did obtain of and from the said I. L. Edwards the possession of the said two mules of the value of four hundred and seventy-five dollars of the moneys and property of the said I. L. Edwards with intent, him, the said I. L. Edwards, then and there to cheat and defraud of the same; Whereas in truth and in fact the said William Young did not have any money in the 'Bank of Chamois,' as he well knew and did not own a large general merchandise store in the town of Chamois, Missouri, as he well knew; against the form of the statutes in such cases made and provided and against the peace and dignity of the State."

The second count is bottomed on section 4765, as amended by the Laws of 1913. [Laws 1913, p. 222.] Since the point is made that this joinder was improper, it may be stated that a motion to quash for alleged misjoinder was filed and overruled. Thereafter a motion to require the State to elect upon which count it would go to jury was filed. This motion seems to have been overruled, but at the close of all the evidence the State elected to go to the jury on the first count, which is set out above, and thereupon dismissed as to the second count. Therefore with the alleged misjoinder, barring the technical phase of vulnerability upon the motion to quash, we need no longer trouble ourselves.

Such of the evidentiary facts as were developed by the evidence runs briefly thus: Defendant appeared at the farm of one I. L. Edwards in Callaway County on the 16th day of April, 1914, and representing him-

self as the owner of the largest mercantile establishment in the town of Chamois and as such owner to be in need of and desirous of buying two mules for the purpose of hauling freight in and around the town of Chamois and for the purpose of advertising his business by the use of a pair of finely matched mules, agreed with said Edwards to buy the mules in question for the sum of \$475. At the conclusion of the trade defendant asked Edwards for a blank check, and requested Edwards, on being furnished therewith, to fill out the same on the Bank of Chamois. Defendant signed the check and then inquired of Edwards when this check would get to the bank; whereupon Edwards inquired of him why he desired to know this and asked defendant whether or not he had the money there to pay the check. Defendant replied that he always had enough money there to pay \$475, but that he had another deal in mind, and thereupon put his hand in his pocket and orally offered to show Edwards a draft for \$1500, which, however, Edwards did not insist upon seeing. The proof shows that Edwards relied upon the statements of defendant in both of the behalves mentioned and thereupon accepted the check and delivered the mules to defendant. But as defendant desired Edwards to send the mules to Jefferson City, the latter paid a liveryman two dollars to take them to the Callaway County end of the bridge which spans the river at Jefferson City and turned them over to defendant.

The check given to Edwards for the mules was not paid when presented, for the reason that defendant had no money in the Bank of Chamois and had not had any therein for two months or more prior to the date at which the check was given, having, as the proof shows, closed his account in the Bank of Chamois on February 12, 1914. The evidence further discloses that defendant not only did not own the biggest mercantile business in Chamois, but at the date of obtain-

ing the mules from Edwards had no store there at all. The proof shows that he had had, some few months prior, a small store in which he had a stock of second-hand clothing, but the proof is that he had closed this out some weeks before making the deal with Edwards. On this latter point in fairness, it may be said in passing, there was countervailing testimony, and the truth of it rests somewhat in the dark.

Defendant brought the mules to Jefferson City and upon reaching there began to make efforts to sell them, finally finding, in one Clem Ware, a purchaser for them on the day following the deal with Edwards at the price of \$325.

The defense was (1) a denial of the alleged pretense as to the stupendous character of defendant's store at Chamois, and (2) that defendant informed Edwards at the time of giving him the check in question that he did not at that time have money enough in the Bank of Chamois to cover the check, but that he would have a sufficient sum therein to take care of the check by the time it reached the bank for payment. For this reason he says, he made inquiry of Edwards as to the time at which, in due course, this check would reach the Bank of Chamois for collection. This conversation is denied by Edwards. The question of the truth of this statement and whether defendant on the said 16th day of April, 1914, had any sort of mercantile business in the town of Chamois, form practically the only contested issues in this case. Touching other points required to be shown, there was either no contradiction or the truth thereof was conceded.

Upon the trial of the case the court gave, among others, instruction numbered one, the goodness of which is seriously questioned upon this record. This instruction is as follows:

"1. The court instructs the jury that if you find and believe from the evidence beyond a reasonable doubt that defendant William Young on or about the

16th day of April, 1914, at the county of Callaway and State of Missouri, wilfully and feloniously and with intent to cheat and defraud, did obtain from one I. L. Edwards two mules of the value of four hundred and seventy-five dollars, or of any other value, then and there being the personal property of the said I. L. Edwards, by means of a check drawn, with intent to cheat and defraud him, the said I. L. Edwards, upon the Bank of Chamois, a bank in which he, the said William Young knew he had no funds, then you must find the defendant guilty as charged in the first count of the information and assess his punishment at imprisonment in the State penitentiary for such term as you deem proper, not to exceed seven years nor less than two years."

Such other facts as may be necessary to make clear what we shall say will be set out in the opinion.

OPINION,

We have not been furnished a brief on the part of the defendant and that filed by the State is perfunctory and regrettably does not discuss all of the questions which we find mooted and deem troublesome. We are left, therefore, to perform our statute-enjoined duty of examining the record for error without material assistance from any source.

I. It is contended that the information herein is bad. We set out in our statement the first count, being that on which defendant was convicted. Information. (Since the second count was dismissed and the State elected not to go to the jury thereon, we need in nowise concern ourselves with either its sufficiency or insufficiency.) After a careful examination and analysis of this information we are impelled to disallow this contention and rule that the information is good. It plainly and succinctly avers and sets forth:

(a) what the pretenses were (State v. Porter, 75 Mo. 171; State v. Miller, 212 Mo. 73); (b) to whom such pretenses were made (State v. Fraker, 148 Mo. 143); (c) that he, to whom the said pretenses were made, relied upon them, and acting upon such reliance was induced to and did part with his property (State v. Vorback, 66 Mo. 168; State v. Donaldson, 243 Mo. 460; State v. Feazell, 132 Mo. 176; State v. Dines, 206 Mo. 649; State v. Hubbard, 170 Mo. 346; State v. Kelly, 170 Mo. 151); (d) that by means of such pretenses said property was obtained (State v. Miller, 212 Mo. l. c. 79); (e) that the property so obtained was owned by I. L. Edwards; (f) that its value was \$475 (Sec. 4565, R. S. 1909, as amended by Laws 1911, p. 194); (g) that said pretenses were made designedly and feloniously with intent to cheat and defraud (State v. Pickett, 174 Mo. 663; State v. Martin, 226 Mo. 538); (h) that the pretenses so made were false (State v. DeLay, 93 Mo. 98; State v. Peacock, 31 Mo. 413); and (i) that defendant knew when he made them that such pretenses were false and untrue (State v. Janson, 80 Mo. 97; State v. Foley, 247 Mo. 607; State v. Shout, 263 Mo. 360; State v. Donaldson, 243 Mo. 460; State v. Roberts, 201 Mo. 702). This is all that is required so far as concerns the component elements of the offense as denounced by section 4565 of our present statutes (State v. Foley, *supra*; State v. Shout, *supra*), as amended by the Laws of 1911.

II. It is also contended by the motion to quash that there was an unwarranted joinder of counts in a single information, in this, to-wit, that the first count charges an offense forbidden by section 4565, Revised

**Misjoinder
of Offenses.** Statutes 1909 (amended, Laws 1911, p. 194), while the second count charges an offense under section 4765, Revised Statutes 1909 (amended, Laws 1913, p. 222). The legal

test of permitted joinder is not whether the offenses charged in different counts of a single information as having been committed in different ways are, or are not, defined and denounced by different sections of the criminal code. The test is: Whether such offenses arose out of the same transaction, and are so far cognate as that an acquittal or a conviction of one would be a bar to a trial for the other. [State v. Christian, 253 Mo. l. c. 394; State v. Daubert, 42 Mo. 242.] Guided by this test a casual examination of the two counts in the light of the proven facts in the case at bar shows that this point has no merit in it; especially in view of the fact that an election to go to the jury only upon one count was actually had herein. This is so, for the reason that the second count was bottomed solely upon the alleged act of defendant in drawing and giving to said Edwards the identical check upon the Bank of Chamois, which is mentioned and described in the first count of the information.

III. It is urged in the motion for a new trial that instructions one and two are bad. We disallow the contention as to instruction two, Instructions: but as to instruction one it must be No Deception. sustained. This instruction is clearly drawn under the second, or dismissed count of the information, that, to-wit, which is bottomed upon section 4765 of our statutes as amended in 1913. [Laws 1913, p. 222.] Said instruction would, we apprehend, be good if this prosecution were under the latter section; but it is bad under the specific charge here.

The vice of this instruction is (the prosecution being bottomed on section 4565) that it does not require the jury to find that Edwards was in fact deceived by the false pretenses made by defendant. [State v. Keyes, 196 Mo. l. c. 145.] Neither did any other instruction in the case require such finding, al-

though the law is fairly well settled that the information must charge and well settled that the proof must show (State v. Dines, 206 Mo. 649; State v. Evers, 49 Mo. 542; State v. Bohle, 182 Mo. l. c. 65) that he who is said to be deceived was in fact deceived, that is, that he did not part with his property with his eyes open, knowing in fact that the defendant was not a merchant in Chamois and knowing in fact that defendant had no money in the Bank of Chamois. [State v. Bohle, 182 Mo. 58.] If Edwards knew at the time the falsity of defendant's pretenses there is no crime committed under section 4565 (State v. Bohle, *supra*), whatever might, in such case, be the effect of defendant's acts coupled with Edward's knowledge, if he were prosecuted under section 4765. The omission to require the jury to find that Edwards relied on, and was deceived by, the false pretenses of defendant was peculiarly hurtful here; because the sole defense urged upon this phase of alleged false representation (and the other phase is not even referred to in the instructions), was that defendant gave the check to Edwards knowing, *and so informing Edwards*, that he had no funds in the Bank of Chamois, but upon the promise to Edwards that the money would be in said bank by the time the check reached there for payment. If these facts so urged in his defense by defendant had been true, it is obvious that no conviction could stand under said section 4565; for the effect of such an agreement to have the money in the bank to pay the check on a future day would be to make of the alleged pretense but a mere promise, and so remove it from the category of crimes. [Kelley's Crim. Law & Proc. 693.]

It is true that at the request of defendant an instruction was given (seemingly written by defendant's learned counsel) which deals specifically with this phase of the defense. This instruction read as follows:

“The court instructs the jury that if you believe from the evidence that at the time the check mentioned in evidence was given, the defendant told the prosecuting witness, Edwards, that the money was not then in the bank on which the check was drawn, but that it would be there by the time the check arrived *and that such promise was made in good faith*, then you will find the defendant not guilty.”

If the latter instruction had been good, it might have cured the evil in instruction one here under discussion. But the instruction last above set forth was bad in this case, for that it contained the words italicised by us. In a prosecution *under section 4565* for obtaining money, goods, chattels, property or credit by false pretenses, the moment such alleged false pretenses are shown to be naked future *promises*, the prosecution inevitably and instantly fails. [State v. Evers, 49 Mo. 542; State v. Vorback, 66 Mo. 168; State v. DeLay, 93 Mo. 98; State v. Petty, 119 Mo. 425; State v. Krouse, 171 Mo. App. 424.] So, it could make no difference here whether the defendant was or was not exercising good faith in making the promise he contends he made to Edwards. If he made this check under the circumstances he says he did, he cannot be guilty of obtaining mules under false pretenses, for either one or both reasons forecast above: (1) Edwards was not deceived (on this, the only phase of false pretenses on which the case went to jury), and (2) the alleged false pretense was but a promise by defendant of a thing to be done by him in the future.

We have carefully examined other matters complained of by defendant, but find all such to fall into either the category of things which are not harmful, or such as will not necessarily happen again upon the next trial. In passing, we may say that it was proper, as showing the intent of defendant, to allow proof by the State of other checks drawn by defendant

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on this same bank, shortly before and shortly after the date of the offense here charged against him, which checks were to defendant's knowledge refused payment for lack of funds. But in such case the jury should be informed by an appropriate instruction that proof of such other recent and similar crimes is admitted for the sole purpose of showing the intent of defendant in giving the check herein complained of (State v. Wilson, 223 Mo. 156), and as showing defendant's knowledge of the condition of his alleged bank account.

It results that for the error above discussed, this case must be reversed and remanded for a new trial. Let this be done. All concur.

INDEX.

ABSTRACT. FAILURE TO FILE. See Appeals, 2 to 6.

ACCOUNTS.

1. **Mechanic's Lien: Sufficient Description.** A description of materials furnished by a dealer in lumber when made in abbreviations and trade terms known and understood to be in use in the trade, is a compliance with the statutory requirement that "such a statement of the claim as fairly appraises the owner and the public of the nature and amount of the demand asserted as a lien" shall be filed; and a decision of the Court of Appeals so holding is in harmony with *Henry v. Plitt*, 84 Mo. 1. c. 241, *State ex rel. v. Reynolds*, 595.
2. ———: ———: **Evidence of Items: Consolidation.** The mere fact that the lien account consolidates in one undated item several charges which show that each was for lumber of the same grade, quality, character and price, and which in the aggregate include the identical quantity of material and the identical amount charged in the consolidated bill, the whole being otherwise lienable matter, is not an objection the owner can urge against the lien claimant, even to the extent of avoiding the consolidated item, there being no proof of bad faith or of resulting injury to any one. *Ib.*
3. ———: ———: ———: ———: **As Affecting Whole Account.** In no event can the consolidation of a few items of the lien account, the aggregate amounts and charges being equal to the amounts and charges of the consolidated items, invalidate the whole lien account, whatever may be its effect upon the items so consolidated. *Ib.*
4. ———: ———: ———: **Excess in Summation.** The fact that the aggregate of the items in the bill of particulars exceeded those of the large lien account by the insignificant sum of \$2.46 is of no consequence. *Ib.*
5. ———: ———: ———: **Dates.** The absence of dates in connection with particular items in a lien account is not important, when it appears from the account that the materials were furnished between given dates which fall within the beginning and close of the account. *Ib.*

ACTIONS.

1. **Public Policy: Settlement of Litigation.** Absent fraud in its various forms, or unlawful or insufficient consideration, settlements tending to avoid litigation and family discord are not contrary to public policy, whether made by all or only a part of those concerned. *Brandenburger v. Puller*, 534.
2. ———: ———: **Consideration.** An agreement of a person legally in a position to contest a will, to refrain from opposing its establishment, in consideration that a definite sum of money be paid to him by the residuary legatee, is supported by mutual considerations. *Ib.*

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ACTIONS—Continued.

3. ———: ———: **Will Contest.** Testatrix gave the great bulk of her property to a residuary legatee who was not an heir at law. Five legatees who were heirs and one heir who was not a legatee, together with the marital consorts of two of them, instituted a will contest in the circuit court against said residuary legatee, her husband and thirty-two other persons. Before the action had been tried the eight plaintiffs, and six defendants, some of whom were heirs at law but not legatees, as parties of the first part, entered into an agreement with the said residuary legatee and her husband by which said first parties affirmed said will as the last and lawful will of the testatrix and agreed that it might be taken and proven as such without further objection, and that upon the payment to them of \$9,500, their interest in said estate, whether as heirs or legatees, should vest in said residuary legatee. Of this amount \$1500 was to be applied to the payment of attorney's fees and costs which had accrued in the suit, and the balance was to go in equal shares of \$1000 each to the eight persons directly interested. Thereafter the parties of the first part appeared in open court, announced their desire to discontinue the action, and fully informed the court of the terms and purpose of the compromise agreement. Thereupon, another defendant, who was an heir and legatee, but not a party to the compromise agreement, was permitted by order of court, to plead as a party plaintiff, and to continue the prosecution of the action, which she did as sole plaintiff, and the trial resulted in a judgment sustaining the will. *Held*, that the compromise agreement was not contrary to public policy, was supported by a valid consideration, was free from fraud, and is binding on the residuary legatee. *Brandenburger v. Puller*, 534.

ACTS OF CONGRESS. See *Negligence*, 7 to 17.

ADMINISTRATION.

1. **Judgment of Probate Court: Collateral Attack.** As to all matters of administration of estates, the orders, judgments and proceedings of the probate court, made in furtherance of the statutory powers devolved upon it, are not subject to collateral attack, unless it affirmatively appears in some portion of the entire record that the steps necessary to the acquisition of jurisdiction were not taken. *Harter v. Petty*, 296.
2. ———: ———: **Silence of Record.** Mere silence of the record is not sufficient to overcome the presumption that a given judgment of a probate court was rendered after jurisdiction attached. *Ib.*
3. ———: ———: **Sale of Property Under Execution.** Where a legacy was given to a named legatee, there was money in the hands of the executor sufficient to pay it after all debts and other legacies as shown by the annual settlement had been paid, and more than two years had elapsed since letters testamentary had been granted, it will not be held, in the absence of any contrary showing by the record, that the probate court was without jurisdiction to make an order directing the legacy to be paid and to award execution thereon against the executor; and a sale of the executor's land by the sheriff in pursuance thereof, will not be held invalid on the ground that the probate court was without jurisdiction. *Ib.*

ADMINISTRATION—Continued.

4. **Belated Notice of Administration: Payment of Legacy.** The fact that the executor delayed for nearly two years after letters testamentary were issued to him the publication of notice of administration will not avail him in an attempt to defeat the sale of his land under execution, in pursuance to an order of court to pay a legacy, made more than two years after the letters were issued, but less than two years after notice was given. He cannot invoke his violation of the statute requiring him to give notice within thirty days, as a ground for defeating either the order or execution. *Ib.*
5. **Interest on Legacy: Collateral Attack.** Whether or not the probate court erred in allowing interest on the legacy from one year after the grant of administration, instead of from the date of demand for the legacy and refusal to pay it, is of no concern in a collateral attack. Such mistakes, if in fact mistakes, could have been corrected on appeal, and since the probate court had jurisdiction of the matter, its judgment cannot be avoided by a collateral attack. *Ib.*
6. **Probate Courts: Concurrent Jurisdiction: To Establish Demands.** Section 34 of article 6 of the Constitution, providing for the establishment of probate courts and defining the bounds of their jurisdiction, did not vest in such courts exclusive jurisdiction, but only concurrent jurisdiction with other courts of record, to entertain suits against administrators for the establishment of demands against estates. And section 197, Revised Statutes 1909, in terms certain, authorizes the establishment of such demands in the circuit court. *State ex rel. v. Holtcamp*, 347.
7. **Purpose: Dissolution.** The estate of a deceased person is a distinct legal entity, and is held in trust and reserved by law primarily for the payment of decedent's debts, and its existence is not dissolved until its demise comes in the orderly and peaceable way ordained by statute. And it is not dissolved, nor does jurisdiction over it cease, so long as a demand, timely begun, is pending in the circuit court undetermined, or if determined, is unpaid out of existing assets. *Ib.*
8. **Establishing Demands in Circuit Court: Exhibition.** The due service of the summons upon the administrator, in an action begun in the circuit court within the time specified by statute after the issuance of letters of administration, is an exhibition of the demand sued on against the estate; and by the filing of the action and service of summons within such statutory period, the circuit court acquires jurisdiction (1) of the subject-matter, or demand, (2) of the person of the legal representative of the estate, and (3) of the estate, in so far as the demand and the right to have it determined are concerned. *Ib.*
9. ———: ———: **Ousting Jurisdiction.** And jurisdiction of the circuit court having lawfully attached can be ousted or divested only by statutes clearly so providing. *Ib.*
10. ———: **Final Settlement in Probate Court: Action Still Pending in Circuit Court.** The probate court is without jurisdiction to order the administrator to make final settlement of the estate so long as an action on a demand, timely brought, in which service of summons was timely obtained, is pending undecided in the circuit court, or on appeal to an appellate

ADMINISTRATION—Continued.

court; and a final settlement, made two years after notice of administration given, and approved by the probate court, and an order directing distribution and discharging the administrator, made while such suit is still pending in either the circuit or appellate court, are likewise void, nor can the payment of a claim established by the action in the circuit court be defeated by the prior approved final settlement and discharge. *State ex rel. v. Holtcamp*, 347.

11. ———: ———: ———: **Estate Not Fully Administered: Jurisdiction.** The probate court has no jurisdiction to determine the liability of the estate upon a demand made the basis of an action timely and properly brought in the circuit court against the administrator, and until the estate's liability thereon is determined the estate is not fully administered, and the probate court has no jurisdiction to determine the estate is fully administered until its liability upon that demand is determined. *Ib.*
12. **Final Settlement: When to be Made: When an Annual Settlement.** A final settlement, when lawfully made, destroys the estate as an entirety and ends all powers of its legal representative; its substance is distributed and its demise is complete. But the statute fixes no definite time when the estate shall be finally settled, but names a condition by which the time may be determined, and that condition is that the estate has been fully administered. A purported final settlement, made before the estate has been fully administered (for instance, while a suit against the administrator to establish a demand against the estate is still pending in the circuit or appellate court), has only the effect of an annual settlement, and beyond that is absolutely void. *Ib.*
13. ———: **Administrator De Bonis Non.** After final settlement an administrator *de bonis non* can be appointed only upon the discovery of unadministered assets, and then only when there are unpaid allowed demands against the estate. But there is no need of an administrator *de bonis non* where the purported final settlement was unlawful, for that it was made before the estate was finally administered. In such case the purported final settlement, though approved by the probate court, is in legal effect an annual settlement, and the administrator continues to be its legal representative, unless removed upon some other statutory ground. *Ib.*
14. ———: **Collateral Attack.** Full administration of the estate must really exist, regardless of the probate court's decision thereon, else a settlement, as a final one, is void, and subject to collateral attack. *Ib.*
15. ———: ———: **Demands Pending In Any Court.** The probate court is without jurisdictional power to approve a final settlement as long as in fact demands are legally pending and undisposed of, either in the probate court or other courts of record, and there are available assets for their satisfaction. *Ib.*
16. ———: **Unlawful: Discharge of Administrator.** If the purported final settlement, approved by the probate court, was unlawful, for that the estate had not been fully administered, there being demands legally pending and assets out of which they may be satisfied, and is for that reason to be con-

ADMINISTRATION—Continued.

sidered in legal effect an annual settlement, the administrator is at all times after such purported final settlement the legal representative of the estate, unless previously lawfully and finally discharged on other grounds, and the estate is bound by all valid judgments in cases timely brought against him in any court of record in which he was duly served. *Ib.*

17. **Judgment: Refused Classification: Mandamus: Proper Remedy.** Where a probate court has refused to hear a matter over which it has jurisdiction, on the ground that it had no such jurisdiction, this court will issue its writ of mandamus to compel it to proceed. So that where the Supreme Court reversed a judgment of the circuit court in a suit brought against the administrator of an estate, and directed judgment against him in a definite amount, and the circuit court in compliance with that direction entered judgment and directed certification thereof be made to the probate court, and that court refused to act in the matter on the ground that the administrator had long previously made final settlement, which had been approved, and had been discharged, mandamus is the proper remedy to compel the probate court to classify the demand and proceed in the matter, because, if for no other reason, it is a proper method to compel the carrying out and giving effect to the judgment which the Supreme Court directed and commanded; and because (BOND, J., concurring) there was no necessity for plaintiff to resort to other modes of redress, which might be applicable except for the conclusiveness of that judgment. *Ib.*
18. **Public Administrator: Power to Take Charge of Estate.** The mere fact that a public administrator takes charge of an estate by filing notice in the office of the clerk of the probate court gives him no greater authority or a more secure right to administer it than he would have were he appointed by the probate court, and no greater authority or right to administer the estate than any other person appointed administrator by the probate court would have. *In re Brinckwirth*, 473.
19. ———: **Probate of Will: After Filing of Notice.** Upon the discovery and probate of a will of deceased after the filing by the public administrator with the clerk of the probate court of notice that he has taken charge of the estate, all his authority and right to administer the estate ceases *ipso facto* and by operation of law; and an order of the probate court vacating the authority assumed by him to act is useless and unnecessary, but one appointing another suitable person administrator with the will annexed is valid. There is no reason why the statute (Sec. 47, R. S. 1909) declaring that "if, after letters of administration are granted, a will of the deceased be found, and probate thereof granted, the letters shall be revoked, and letters testamentary, or of administration, with the will annexed, shall be granted" should not apply to a public administrator who takes charge of an estate under section 305. *Ib.*
20. ———: ———: **Notice of Vacation of Assumed Authority.** The order of the probate court revoking the authority of the public administrator to administer an estate, made after the discovery and probate of decedent's will, is not void on the theory that he was entitled to notice of the court's intention to make the order, for two reasons: first, because, having before the discovery and probate of the will, filed his notice with the

ADMINISTRATION—Continued.

clerk of the probate court that he had taken charge of the estate, he was already in court, and is required by law to take notice of all papers, documents, etc., filed in the case, except where actual notice is required by statute; and, second, because he had no vested right, as public administrator, to a hearing, his assumption to act being conditional upon the discovery and probate of the will, and upon that condition happening his right to further administer the estate *ipso facto* ceased, without any order of revocation. In re Brinckwirth, 473.

21. **Priority: Discretion of Court.** Notwithstanding the provisions of section 15, Revised Statutes 1909, naming certain persons entitled to priority to administer estates, upon the discovery and probate of a will which names no one as executor, the probate court may, in the exercise of its sound discretion, and in the face of certain circumstances named in the statute, appoint the public administrator, administrator with the will annexed; but it is not compelled to appoint him, and, if some one else is appointed, no statutory right of his is violated. *Ib.*
22. **Evidence: Circumstance.** In an suit by an administrator against decedent's wife to recover bonds, which she claims as her own, testimony by an attorney that at a time certain decedent brought his wife to his office and stated the circumstance of a loss of bonds belonging to his wife and not in suit, is admissible as tending to show that at that time she owned and possessed bonds, and as a circumstance from which an inference may be drawn throwing some light upon the purpose for which both held a joint interest in the safety deposit box in which the bonds in suit were kept. *Carmody, Admr., v. Carmody*, 556.
23. **Bonds in Widow's Possession: Instruction: Where She Claims as Purchaser.** In a suit by the administrator against decedent's widow to recover bonds in her possession, which she claims to own as a purchaser, and not as a gift from her husband, it is error to refuse an instruction declaring that if decedent, in his lifetime, purchased and paid for the bonds and they were delivered into his possession at the time of the purchase, the finding must be for plaintiff. *Ib.*
24. ———: ———: **Answers to Interrogatories: As Pleadings and Evidence.** In a suit by an administrator to recover bonds in the possession of decedent's wife claimed by her as the owner, the written interrogatories propounded to her for an answer, and her written answers thereto are to be considered merely as pleadings in the case, and the statements contained in said answers cannot take the place of testimony, but testimony should be offered upon the trial as in any other case. *Ib.*
25. ———: ———: ———: **Waiver.** Nor does the filing of interrogatories in such a case constitute a waiver of the incompetency of the wife to testify to transactions between her and her deceased husband involving the cause of action and at issue. *Ib.*
26. ———: ———: **Instruction.** In such a case an instruction declaring that the statements made in the answers to the interrogatories propounded by the administrator to the wife that are in her own favor are not competent as evidence, and do not tend to prove, nor can they be considered as tending to prove, that the wife owned or acquired by gift or purchase

ADMINISTRATION—Continued.

from her husband, or otherwise, any of the bonds, is a correct declaration of law, and being applicable to the facts should be given. *Ib.*

ADMISSION.

1. **Evidence: Undenied Statement of Another.** A defendant cannot be charged with an undenied damaging voluntary statement made by a party out of his presence, when to deny it would require him to shout his denial up a stairway to a woman in the employ of his co-defendant.

Held, by WALKER, J., dissenting, that visual and immediate physical presence is not necessary to authorize the application of the rule which renders testimony in regard to a damaging statement competent, and construes silence, under a proper condition, to be an admission of the truth of such statement; hearing and understanding, and not mere proximity, are the tests of the admissibility of such testimony. *State ex rel. v. Ellison*, 604.

2. ———: ———: **Silence: Impertinence: Personal Security.** A failure by a defendant to reply to a damaging statement cannot be held to be an admission of its truth and is not admissible in evidence: first, if made under such circumstances as affords him no opportunity to reply, for instance, if the denial must be shouted up a stairway; second, if it is a voluntary statement made by the office girl or other mere employee of a co-defendant, who may have adverse interests, and therefore not demanding a denial; third, if voluntarily made by a stranger (that is, a person not a party to the action) and, therefore, an impertinence; and, fourth, if made under such circumstances that the defendant, as a matter of personal security, has a right to ignore it.

Held, by WALKER, J., dissenting, that, where two physicians had offices on different floors of the same building and the one below had treated the patient of the other, and when the officer came to serve the summons on them in the action for civil damages by the patient, the one below called up the stairs to the office girl of the other, to know if she had a record in the case, and she replied that she had and that the patient was the school teacher into whose eye he had dropped iodine and put it out, the answer was not a voluntary statement, nor an impertinence, but made by one whose authority to give it was recognized by the physician, and should have been admitted as evidence of his acquiescence therein. *Ib.*

3. ———: **Probative Force.** A failure to deny or to reply to a voluntary statement made by a stranger to the action to a defendant, is the weakest of all evidence in probative force, and is not admissible as an admission of its truth except when made under such circumstances as point clearly to the necessity for a reply. *Ib.*

ADULTERINE BASTARD. See *Children*.

ALLEYS. See *Cities*.

APPEALS.

1. **Constitutional Question: Part of Statute: No Objection at Trial.** The objection that certain parts of a statute constitute a wrongful delegation of legislative power to an administrative

APPEALS—Continued.

- officer, being an objection that does not go to the whole act, to be available on appeal, should have been made at the trial. In re Birmingham Dr. Dist., 60.
2. **Failure to File Abstract: Penalty.** Where appellant has in due time filed with the clerk of the Supreme Court a short-form transcript of the judgment and order of appeal, but has failed to file or serve respondent with a printed abstract of the entire record within the time prescribed by the rules of the court, the order of the court will be a dismissal of the appeal, and not an affirmance of the judgment; and that must be the holding despite the fact that respondent urges that complications may arise as to the liability of sureties on the *supersedeas* bond, if the appeal is dismissed. [Refusing to follow or discuss *Mattenlee v. Mattenlee*, 74 S. W. 889, because it does not appear to have been officially reported or authoritatively promulgated.] *Bank v. Kropp*, 218.
 3. ———: **Affirmance: Statutory Requirement.** The affirmance of the judgment appealed from provided by section 2047, Revised Statutes 1909, was not intended necessarily to follow a failure to file a proper abstract within the time prescribed by the rules of the court. The right to affirmance, as prescribed by that statute, seems to have been made to depend upon a failure of appellant to file a complete transcript or a certificate of the judgment and order of appeal in the appellate court, etc., within the time prescribed by section 2048. *Ib.*
 4. ———: ———: **Rule of Court.** The rules of the Supreme Court made under the direct authority of a statute, have practically the binding force and effect of a statute. And while the court has power to change its rules, the change ought to be in substance, and the rule should not be nullified by a collateral attack. *Ib.*
 5. ———: **Penalty Fixed by Rule of Court.** There being no specific penalties attached by section 2048, Revised Statutes 1909, to a failure of appellant, who has in due time filed a short-form transcript, to file a printed abstract in time, the court is empowered to fix the penalties by rule of court; and Rule 16 fixes the penalty at dismissal of the appeal, or at a continuance to the next term, and not at affirmance of the judgment. *Ib.*
 6. **Completion: Penalty.** While the appeal is not so far completed as to allow appellate review by the filing of a short-form transcript, it is completed within the purview of section 2047, Revised Statutes 1909, so far as concerns the penalty of affirmance therein provided; and having been that far completed, Rule 16 steps in and says the penalty for failure to file a printed abstract shall be a dismissal or a continuance. *Ib.*
 7. **Appellate Jurisdiction: State Board of Health a Party.** The jurisdiction of the members of the State Board of Health is coextensive with the State, and hence they are classed as State officers; and an appeal from the judgment of a circuit court quashing a writ of *certiorari* issued against the members of said board on behalf of a physician whose license to practice medicine had been revoked by them, is to the Supreme Court. *State ex rel. v. State Bd. of Health*, 242.

APPEALS—Continued.

8. **Constitutional Question: Raised in Motion for New Trial: No Bill of Exceptions.** An attack upon the validity of a certain statute, made for the first time in the motion for a new trial, if the abstract contains no part of the bill of exceptions, cannot be considered on appeal. A motion for a new trial is not a part of the record proper, but a part of the bill of exceptions, wherein must be preserved an exception to the overruling of the motion; and if the abstract contains no bill of exceptions, any assignment made in the motion for a new trial alone cannot be considered on appeal, although that motion is printed in the abstract as a part of the record proper. *Ib.*
9. **State Board of Health: Review of Action: No Bill of Exceptions.** Notwithstanding the fact that appellant's abstract does not contain a bill of exceptions and the validity of the statute under which his license to practice medicine was revoked, raised for the first time in the motion for a new trial filed in the circuit court, cannot be considered on appeal, the duty still remains on the court to determine the legality of such revocation upon the record before the State Board of Health, and certified upon writ of *certiorari* to the circuit court. *Ib.*
10. ———: **Review of Evidence: Certiorari.** As a general rule the writ of *certiorari* brings up only the record proper of the tribunal to which it is addressed, and does not bring up the evidence; but in a case in which the State Board of Health has revoked the license of a physician, he may have the proceedings of said board reviewed under the provisions of section 8317, Revised Statutes 1909. *Ib.*
11. ———: ———: ———: **Questions for Review.** Where the evidence and record before the State Board of Health have upon *certiorari* been certified to the circuit court, and the decision of the board sustained and the writ of *certiorari* quashed, two propositions are presented for determination on the record made before the board: (a) Does the complaint filed before the board state a good cause of action for revoking relator's license by the board under the statute (Sec. 8317, R. S. 1909); and (b), Was the evidence adduced before the board sufficient to sustain the charges contained in the complaint and to warrant the board in revoking relator's license and in inflicting the penalty entered? *Ib.*
12. **From Public Service Commission: Evidence and Procedure.** The evidence in any case appealed from the Public Service Commission is required to be preserved and transferred to the circuit court, and that court determines the case on that evidence; and on appeal from the circuit court, the full substance, if not the entire evidence, must be brought to the Supreme Court, and this court determines the propriety of the judgment of the circuit court upon that evidence, as in an equity proceeding, by a trial *de novo*, and will direct the circuit court to affirm or reverse the judgment of the commission, but not to modify it, nor will it direct the dismissal of the proceedings, since its jurisdiction is derivative. *Railroad v. Public Service Comm., 333.*
13. **Motion to Dismiss: Evidence: No Motion for New Trial.** Where one ground of a motion to dismiss as to movents was that the record shows on its face that if plaintiff ever had a right to establish a mechanic's lien on their property such right had expired, and that part of the motion only is sus-

APPEALS—Continued.

tained, and an appeal is taken by plaintiff from that judgment to the Court of Appeals, that court, having otherwise appellate jurisdiction in the matter, cannot refuse to consider the point raised by the motion upon the ground that it required a motion for new trial to preserve the point for review. No motion for a new trial was necessary, nor did a proper determination of the point put in issue require an examination of the evidence, nor was evidence necessary or even proper. Things appearing on the face of the record conclusively speak for themselves. *State ex rel. v. Ellison*, 423.

14. ———: ———: **Other Grounds of Motion.** Nor does the fact that the motion to dismiss contained other grounds, which could be sustained only by evidence, and that evidence was offered in support of them, and they were not sustained, alter the right of the plaintiff on appeal, without any motion for a new trial filed in the trial court, to have that part of the motion charging that the amended petition showed on its face that plaintiff's right to a mechanic's lien had expired, and which was separately sustained, considered by the appellate court—not even though movents had done the useless thing of supporting the point by evidence. *Ib.*
15. ———: **Grounds Assigned.** On appeal the court must presume that the trial court sustained a motion to dismiss on the ground specifically assigned by it—in this case, that a motion to dismiss is sustained on the "first ground" assigned in that motion, which was that the petition showed on its face that the right to a mechanic's lien sought by it had expired. *Ib.*
16. ———: **Where No Ground Is Assigned.** Where the motion to dismiss assigns several grounds, one of which is to the effect that the petition shows on its face that the action is barred, and others which call for evidence to establish them, and the motion is sustained without any assignment of the ground therefor, then on appeal by plaintiff he cannot rely solely upon the disclosures of the record proper, because, as long as the motion went both to the record proper and matters of exception, the appellate court will indulge the presumption that the trial court decided correctly, if not upon the disclosures of the record proper, then upon the matters of exception alleged in the motion, there being no motion for a new trial and hence no evidence preserved for review. But where the trial court sustains the motion on the specific ground that the record shows on its face that the action is barred, then that point is for consideration in the appellate court, without any motion for a new trial. *Ib.*
17. **Appellate Jurisdiction: Title to Real Estate: Condemnation: Easement.** A suit by a city to condemn private land for sewer purposes involves title to real estate. Even though a cursory view may suggest that only the easement and not the fee is affected, yet it remains true that, though the fee remain in the owner, his right to the use and exclusive possession of the land is either lessened or taken away, and as a consequence the title is affected to the extent of the injury. *Moberly v. Lotter*, 457.
18. ———: ———: **Writ of Error Issued by Court of Appeals: Transfer to Supreme Court.** After a writ of error has been timely and properly sued out in a court of appeals in a case

APPEALS—Continued.

of which such court does not have appellate jurisdiction (in this case, because it involves title to real estate), that court has power to transfer the case to the Supreme Court, which will take jurisdiction in the same manner as it would had an appeal in the case been erroneously certified by the trial court to the Court of Appeals and by that court transferred to this court. [GRAVES, J., and WOODSON, C. J., dissenting.] *Ib.*

19. ———: ———: ———: Constitutional Limitations and Statute. The definitions of the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals contained in the Constitution and the limitation upon the right of either to issue writs of error to cases reviewable by it, must be construed in connection with the power given by the Constitution (Section 6 of Amendment of 1884 to Article 6) to the General Assembly to provide by legislation for the transfer of cases from the one court to the other, and that has been done by section 3938, Revised Statutes 1909, directing the course to be pursued in case the writ is sued out in a court not having appellate jurisdiction. The authority conferred by this statute is not an exercise of jurisdiction, but of a power to determine whether or not jurisdiction exists, and in its absence, as determined by the court, to transfer the case to the court invested with power to review it. The constitutional provision defining the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals applies as well to writs of error as to appeals. *Ib.*
20. ———: ———: ———: New Suit. The fact that the writ of error, by which the case was lodged in the Court of Appeals, is a new suit, does not determine the right of that court to transfer the case to the Supreme Court. The writ of error is to be held a new suit only to the extent of determining whether there is a *lis pendens* between the rendition of the judgment in the trial court and the suing out of the writ. *Held*, by GRAVES, J., dissenting, with whom WOODSON, C. J., concurs, that the suing out of a writ of error is the beginning of a new suit, and a court of appeals can institute no new suit in a case involving title to real estate, and is without jurisdiction to even take the preliminary step in such a suit; and being without jurisdiction in such case to issue a writ of error, but its issuance being *coram non judice*, it can confer no jurisdiction upon the Supreme Court by a transfer of the case—the issuance of the writ being its own mistake, and not that of the circuit court, which may certify an appeal already taken to the wrong appellate court. *Ib.*
21. ———: ———: ———: Applicability to Original Writs. Cases involving remedial writs reviewable only in the Supreme Court are not within the purview of Section 3938, Revised Statutes 1909, which by its terms is confined to appeals and writs of error. Any one of such writs, if improvidently sued out of a court of appeals, should be dismissed, because the court has no constitutional power to consider it. *Ib.*
22. Appellate Practice: Writ of Error: No Bill of Exceptions. If there is no bill of exceptions or motion for new trial, a writ of error preserves only the record proper for review. *Ib.*
23. ———: Record Proper: Admission in Abstract. An admission by plaintiffs in error in a condemnation case that the

APPEALS—Continued.

petition contains a detailed description of the lands owned by them and of the parts to be taken, and asserting that for that reason the description is not set out, authorizes a holding that the lands to be taken are described with sufficient certainty. *Moberly v. Lotter*, 457.

24. **Public Service Commission.** On appeal from the rulings of the circuit court, requiring the Public Service Commission to receive evidence which it had refused to receive, it is the rulings or errors of the court that are for review, and not those of the commission. *Macon v. Public Service Comm.*, 484.
25. ———: **No Evidence.** In the absence from the record of the evidence adduced before the circuit court there can, on appeal, be no review of its rulings: (a) Where the circuit court, upon *certiorari*, had affirmed the action of the Public Service Commission and approved its admission of evidence; or (b) where the circuit court had reversed and remanded the case to the commission for errors in refusing to admit relevant and competent evidence; or (c) where, upon the facts adduced in evidence, the finding of the commission was erroneous as a matter of right and equity and good conscience. *Ib.*
26. ———: ———: **No Motion for New Trial: No Bill of Exceptions.** The statute makes the appellate procedure pertaining to appeals in civil cases applicable to appeals from the rulings of the circuit court affirming, upon *certiorari*, the action of the Public Service Commission; and unless the evidence before the circuit court is preserved in a bill of exceptions, and kept alive by a motion for a new trial, there is nothing for review on appeal to the Supreme Court except the bare record of the proceedings in the circuit court. Even though the case be denominated one in equity, there can be no review of the evidence, unless there is both a motion for a new trial and a bill of exceptions. *Ib.*
27. **Constitutionality of Statute: Not Timely Raised.** The Supreme Court on appeal will not consider the constitutionality of a statute upon which plaintiff has bottomed his case, where defendant did not raise the question of its invalidity until he had lost his case and came to file his motion for a new trial. Ordinarily a constitutional question must be lodged in a case as soon as is procedurally possible after the statute, order, judgment or thing alleged to be unconstitutional appears in the case. *Deiner v. Sutermeister*, 505.

APPROPRIATIONS FOR SUPPORT OF PUBLIC SCHOOLS. See *Revenue*.

ASSESSMENT FOR TAXES. See *Taxes and Taxation*, 2 to 4.

AUTOMOBILE DRIVER. See *Manslaughter*.

BANK COMMISSIONER AS DEPOSITARY. See *Trust Companies*.

BASTARDS. See *Children*.

BENEFITS.

1. **Entire Line of Railroad.** The fact that the railroad company's line will be left exposed to overflow for many miles

BENEFITS—Continued.

along the river front at points not included in the district, does not authorize the exclusion of its entire line. In re Birmingham Dr. Dist., 60.

2. ———: **Inclusion of Lands not Benefited.** The extent to which a tract of land will be benefited does not go to the question of the propriety of including it in the drainage district, but rather to the amount of benefits to be assessed against it. Evidence showing that about one-fourth of the land included is in need of drainage at all times, that about one-tenth of it overflows only in times of very high water, that the remainder has overflowed frequently in the last score of years, and that a portion of appellant's railroad track has overflowed at times in recent years, will authorize a decree incorporating a drainage district, and the inclusion of appellant's track. *Ib.*
3. **Unjustified Reclamation: When Objection Must Be Made.** The objection that the work of reclamation will be so costly that it will not be justified by the benefits which may accrue, should be made when the plan of reclamation has been adopted and the cost and benefits estimated. If it proves true that the costs will not be justified by the benefits, the court must dissolve the incorporation.
4. **Abutting Property: Special Taxes.** *Held, arguendo*, that, in the absence of an express statute to the contrary, only such property as fronts along the side lines of a street or alley is chargeable with the costs of a public improvement therein, and land whose side line lies along the rear end of a blind alley is not so chargeable. *Supply Co. v. Iron Works*, 138.

BILL OF EXCEPTIONS. See Exceptions.**CAPITOL**

1. **New State Capitol: Furniture.** The Act of March 24, 1911, Laws 1911, p. 108, providing for the building of a new state capitol, invested the State Capitol Commission Board with no authority to purchase furniture for the new building. The board is by it created "for the purpose of building a new state capitol," and it specifically says that the terms of its members "shall end with the construction of the building;" and while it makes an appropriation of the money for the construction of building and the purchase of additional grounds, it makes none for buying furniture. *Stephens v. Gordon*, 206.
2. ———: ———: **Purchaseable Out of Other Funds.** The said act limits the State Capitol Commission Board's power to expend money to a sum of \$500,000 less than the bond issue authorized by the people; and the cognate acts disclose that this \$500,000 is the sum set aside by the act submitted to the people as the maximum amount, out of the proceeds of the bonds, which is to be available for other purposes than the construction of the capitol, including furniture, and this entire sum, out of which the provision for furniture is made, the board is directly excluded from using. *Ib.*
3. **Ambiguity in Statute: Resort to its Title.** Where the terms of an act are ambiguous, resort may be made to its title for whatever light it can give; but resort to the title is not justified if the body of the act is free from ambiguity. And the Act of March 24, 1911, being entirely clear and on its

CAPITOL—Continued.

face showing that it does not authorize the State Capitol Commission Board to purchase furniture for the new capitol, it is of no consequence that its title covers the furniture as well as its construction. *Stephens v. Gordon*, 206.

4. **New State Capitol: Building and Furniture: Single Board.** The act adopted by the people, authorizing the issuance and sale of bonds for building a new state capitol, did not provide that a single board should have charge of the construction of the capitol and the purchase of furniture, nor did it prohibit the creation of separate boards, nor provide for any board at all; but it left the Legislature untrammelled in that respect, and the cognate legislative act invests the only board it created with no power to buy furniture for the new building. *Ib.*

CERTIFICATION.

1. **The Word "Certify."** The word certify is not indispensable to a certificate. It means to give certain knowledge or information, or to testify with certainty in writing. *State ex inf. v. Jones*, 191.
2. ———: **Sufficiency.** A written statement setting forth the place and time of the special meeting called by the county superintendent to pass on the question of the organization of a consolidated school district, that the qualified voters met as per the call, that they were called to order by said superintendent, that a certain voter was elected chairman and another secretary, that the chairman ordered a ballot taken on the proposition, that it resulted in so many votes for consolidation and so many against, and that six directors were elected, etc., and signed by the chairman and secretary and sworn to by them, contains the facts required to be certified by the statute, and is not insufficient as a matter of law. *Ib.*

CERTIORARI.

1. **State Board of Health a Party.** The jurisdiction of the members of the State Board of Health is coextensive with the State, and hence they are classed as State officers; and an appeal from the judgment of a circuit court quashing a writ of *certiorari* issued against the members of said board on behalf of a physician whose license to practice medicine had been revoked by them, is to the Supreme Court. *State ex rel. v. State Bd. of Health*, 242.
2. **State Board of Health: Review of Action: No Bill of Exceptions.** Notwithstanding the fact that appellant's abstract does not contain a bill of exceptions and the validity of the statute under which his license to practice medicine was revoked, raised for the first time in the motion for a new trial filed in the circuit court, cannot be considered on appeal, the duty still remains on the court to determine the legality of such revocation upon the record before the State Board of Health, and certified upon writ of *certiorari* to the circuit court. *Ib.*
3. ———: **Review of Evidence.** As a general rule the writ of *certiorari* brings up only the record proper of the tribunal to which it is addressed, and does not bring up the evidence; but in a case in which the State Board of Health has revoked

CERTIORARI—Continued.

the license of a physician, he may have the proceedings of said board reviewed under the provisions of section 8317, Revised Statutes 1909. *Ib.*

4. ———: ———: Questions for Review. Where the evidence and record before the State Board of Health have upon *certiorari* been certified to the circuit court, and the decision of the board sustained and the writ of *certiorari* quashed, two propositions are presented for determination on the record made before the board: (a) Does the complaint filed before the board state a good cause of action for revoking relator's license by the board under the statute (Sec. 8317, R. S. 1909); and (b), Was the evidence adduced before the board sufficient to sustain the charges contained in the complaint and to warrant the board in revoking relator's license and in inflicting the penalty entered? *Ib.*

CERTIORARI TO COURT OF APPEALS.

1. Quashing Judgment of Court of Appeals. The Supreme Court has constitutional authority to quash the judgment of a court of appeals in any case wherein its judgment has been the result of its refusal to follow the last previous ruling of the Supreme Court upon any matter of law or equity involved in the case. *State ex rel. v. Ellison*, 604.
2. ———: Statement of Facts. Upon *certiorari* directed to a court of appeals, the Supreme Court can confine itself to the facts found by that court; this, upon the presumption that, where that court has undertaken to state the facts, it has stated all the facts of record upon the question in issue. *Ib.*

See, also, Insurance, 7, and Mechanic's Lien.

CITIES.

1. Vacating Alley. Subject to the constitutional inhibition against taking or damaging private property for a public use, the city of St. Louis, under its charter, has the power and authority by ordinance to vacate an alley. *Supply Co. v. Iron Works*, 138.
2. ———: Abutting Property. Property abutting on a public alley is property abutting along its sides, and not property that lies along the rear end of an alley extending into but not through a block. *Ib.*
3. ———: Right to Injunction: No Abutting Property. The owners of land which lies only along the rear end of a public alley extending into a block, not being abutting owners, will, if the alley is vacated, sustain only such damages as are common to the public generally, and are not therefore entitled to a decree nullifying an ordinance vacating the alley. *Ib.*
4. ———: Abutting Property: Special Taxes. *Held, arguendo*, that, in the absence of an express statute to the contrary, only such property as fronts along the side lines of a street or alley is chargeable with the costs of a public improvement therein, and land whose side line lies along the rear end of a blind alley is not so chargeable. *Ib.*
5. Constitutional Law: Title: Four Councilmen in Title: Two in Body of Act. The title of an act authorizing a city

CITIES—Continued.

- of the third class to elect a mayor and four councilmen at large, the body of which provides for the election of four councilmen as a maximum, but permits the election of three or even two according to the population of cities adopting the act, is not violative of the Constitution, since the title is a fair forecast of the contents of the bill and its subject. *Barnes v. Kirksville*, 270.
6. ———: ———: **Population.** Nor does the body of the act use words of present meaning when referring to the population which shall entitle certain cities to organize thereunder, but a simple inspection of its language demonstrates that it only means the future population which those cities must have that are to elect two or three or four councilmen according to the apportionment made by the act. *Ib.*
 7. ———: **Commission Form of Government: Special Law.** The Act of 1913, authorizing cities of the third class, after having adopted it, to elect a mayor and two, three or four councilmen at large, is not a special or local law. Both in its title and body, its words of classification according to population are applicable to all cities which now do or in the future may fall within these specifications. *Ib.*
 8. ———: ———: **Fifth Class of Cities.** The said act does not alter the preexisting classification of a city adopting it as one of the third class, but leaves it, and all other cities which may adopt its provisions, in the same class in which they belonged prior to its enactment. It merely gives to them, for purposes of administration, similar governmental powers and functions, and expressly provides that all these new methods of administration may be surrendered and those which such cities formerly had may be resumed, at any time, at the option of the voters. It does not create a fifth class of cities. *Ib.*
 9. **Commission Form of Government: Not Sovereignities.** Municipalities which have adopted, the statute providing for commission form of government and are governed by commissioners are in no sense sovereignities, and do not fall within the constitutional provisions apportioning the powers of sovereign States. *Ib.*
 10. **Fire Limits: Definition of Structures.** Within properly defined limits a municipal legislative body may define the object designed to be affected by its fire-limit ordinances and a court in construing such ordinances is ordinarily bound to follow the city's definitions of buildings and other structures so affected. *St. Louis v. Nash*, 523.
 11. ———: **Tent: Lacking Portability: Building.** A structure lacking the element of portability, and being canvas stretched and held in place by a wire cable attached to two large telegraph poles set firmly in the ground and by guy cables run laterally from this main cable to other posts also set firmly in the ground, with a stage, dressing rooms, ticket office and benches built of wood, the whole used as a moving-picture theatre, is not a tent, as that word is ordinarily understood; but under the ordinances of St. Louis declaring that the word "building" shall be taken to mean "any structure for the support, shelter or enclosure of persons, animals or chattels" is a building within the purpose and intent of the fire-limit restrictions. *Ib.*

CITIES—Continued.

12. ———: Reasonable Regulation. And an ordinance which prevents the carrying on of a permanent business in such a building is a reasonable police regulation. *Ib.*

CHILDREN.

1. Legitimation: Adulterine Bastard. The statute contemplates the legitimation of adulterine bastards the same as it does other children born out of lawful wedlock whose parents subsequently marry. *Drake v. Hospital Assn.*, 1.
2. ———: ———: Recognition: Presumption. The marriage, after emancipation, of a man to a woman who while she was a slave gave birth to an illegitimate child, and the subsequent recognition of such child by him as his own, there being evidence that they lived in the same community and none that he did not have opportunity to become the father of such child, although at the time of its birth another woman was his slave wife, raises the presumption that he was the child's father; and if that presumption is not overcome by evidence showing him to have been impotent or otherwise incapacitated to become a father at and prior to the child's birth, such child is to be held legitimate, the same as one born in lawful wedlock. *Ib.*
3. ———: ———: Presumption: Impotency: Instruction. The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable. Likewise, the presumption that a man who marries the mother of an adulterine bastard and subsequently recognizes such child as his own, was its father, is also rebuttable. And where there is testimony tending to show that at and prior to the child's birth he was impotent, an instruction declaring that he is presumed to have been the child's father from the fact of his marriage of the mother and his subsequent recognition of her illegitimate child as his own, is error, since it ignores and omits any reference to the evidence tending to overcome that presumption. *Ib.*
4. ———: ———: ———: Evidence of Impotency. Testimony that the putative father of the illegitimate child had mumps before he knew the child's mother, which he said rendered him impotent through life, and that his scrotum after his death was gone, is evidence tending to establish his impotency. *Ib.*

CONDEMNATION. See Eminent Domain.

CONFESSION. See Evidence.

CONSOLIDATED SCHOOL DISTRICT. See Public Schools.

CONSTITUTIONAL LAW.

1. Title to Act: Broad Enough to Include Amendment. The title to the Act of 1879, being "An Act to provide for the formation of drainage districts, to reclaim and drain swamp and overflowed lands in this State," was broad enough to include provision for any work, whether drain or levee, effectual for the purposes of reclamation; and in consequence, any subsequent amendment by mere reference to that act by section, article and chapter, as it later appeared in the Revised Statutes, fell within the title, so long as it related to the general purposes of reclamation; and all subsequent amendments have related thereto, and have been germane to the subject-matter of that act. *In re Birmingham Drainage District*, 60.

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CONSTITUTIONAL LAW—Continued.

2. ———: **Levees and Drains: Two Similiar Statutes.** The fact that the Legislature by progressive amendments has brought the Act of 1879 (now Act of March 24, 1913, Laws 1913, p. 232) and the Act of 1887 (now Act of April 7, 1913, Laws 1913, p. 290) into almost exact harmony as to the character of lands which may be included in a district, the persons who may move for its incorporation and the methods to be employed in working out its destiny, does not destroy any part of the Act of March 24, 1913, or limit the powers by it explicitly conferred upon a district organized under it. A district may be organized under that act for the purpose of reclaiming overflow land by the construction of a levee. In re Birmingham Drainage District, 60.
3. ———: **Delegation of Legislative Power to Engineer.** That part of section 10 of the Act of March 24, 1913 (Laws 1913, p. 232), which provides that the plan of reclamation, as reported by the engineer, or modifications thereof as approved by him after consultation, shall be adopted by the board of supervisors, is not unconstitutional as a delegation of legislative power to the engineer. In the nature of things there must be a plan, and some one must be empowered to adopt a plan, and manifestly the Legislature cannot provide detailed plans of reclamation in such general acts. Ib.
4. ———: ———: **When Raised.** Besides, the objection that said part of the act is unconstitutional on the ground that it is a delegation of legislative power to the engineer, not being one that goes to the whole act, does not fall within the scope of the objections which the statute prescribes may be made to the incorporation of the district. Ib.
5. ———: ———: ———: **At the Hearing.** Moreover, that objection should be made at the hearing. Ib.
6. ———: **Voting by Acres: No Representation by Owners of Personalty.** That part of section 5 of the act which provides that in electing the first supervisors each "acre of land in the district shall represent one share, and each owner shall be entitled to one vote in person or by proxy for every acre of land owned by him in such district" is not unconstitutional, on the theory that it disfranchises those who own less than one acre and those owning personalty only. The exclusion from voting of those who own personalty only is not objectionable, since personalty is not in any wise affected by the act; and since it states each acre shall represent one share, it follows that each fraction of an acre represents a corresponding fractional portion of a share, and its owner is authorized to vote accordingly. Ib.
7. ———: **Excessive Indebtedness: Special Taxes.** An objection that the large sums necessary to construct the contemplated improvement will create an indebtedness in the form of taxes in excess of and contrary to the constitutional limitation upon taxation, will not avail to defeat the incorporation of a drainage district. The costs of the improvement are benefits assessed against the property, and such assessments are not public taxes. Ib.
8. ———: **Inclusion of Railroad.** The Act of March 24, 1913, Laws 1913, p. 232, authorizes the inclusion of a railroad as a part of the drainage district. It is not excluded by section 39, which provides that the word "owner" as used in the act shall

CONSTITUTIONAL LAW—Continued.

not include reversioners, remaindermen, trustees or mortgagees, "who shall not be counted and need not be notified by publication, or served by process, but shall be represented by the present owners of the freehold estate in any proceedings under this act," for that section does not exclude any one, whether the owner of a freehold or an easement in land. *Ib.*

9. **Cities: Vacating Alley.** Subject to the constitutional inhibition against taking or damaging private property for a public use, the city of St. Louis, under its charter, has the power and authority by ordinance to vacate an alley. *Supply Co. v. Iron Works*, 138.
10. **Party to Action: Against Interstate Carrier: Scope of Federal Employers' Liability Act.** The Employers' Liability Act of Congress completely covered the subject of the liability of an interstate carrier to its employees, and superseded all State statutes on the subject; and as it provides that an action for the negligent killing of such an employee accrues to his legal representative, the State statute, authorizing such action to be brought by his widow, is no longer operative, but as to interstate carriers has been *pro tanto* repealed by the exercise by Congress of its constitutional power to regulate commerce among the States. *Sells v. Railroad*, 155.
11. **Consolidated School District: Rights of Existing District.** There is no infringement upon the constitutional right of an existing school district by taking from it a part of its territory and including it within the boundaries of the consolidated district proposed to be formed, without giving to the voters of the part not taken the right to vote on the question of organization of the consolidated district. The Legislature is given the power to provide methods of forming new districts, changing the boundary lines of old ones and dividing existing districts. *State ex inf. v. Jones*, 191.
12. ———: ———: **Voters.** The voters within the consolidated school district as bounded by the county superintendent are entitled to vote on the question of the organization thereof, and the statute gives no persons outside that territory the right to object because he was not consulted. *Ib.*
13. **Constitutional Question: Raised in Motion for New Trial: No Bill of Exceptions.** An attack upon the validity of a certain statute, made for the first time in the motion for a new trial, if the abstract contains no part of the bill of exceptions, cannot be considered on appeal. A motion for a new trial is not a part of the record proper, but a part of the bill of exceptions, wherein must be preserved an exception to the overruling of the motion; and if the abstract contains no bill of exceptions, any assignment made in the motion for a new trial alone cannot be considered on appeal, although that motion is printed in the abstract as a part of the record proper. *State ex rel. v. State Bd. of Health*, 242.
14. ———: **Title: Four Councilmen in Title: Two in Body of Act.** The title of an act authorizing a city of the third class to elect a mayor and four councilmen at large, the body of which provides for the election of four councilmen as a maximum, but permits the election of three or even two according to the population of cities adopting the act, is not violative of the Constitution, since the title is a fair forecast of the contents of the bill and its subject. *Barnes v. Kirksville*, 270.

CONSTITUTIONAL LAW—Continued.

15. ———: **Population.** Nor does the body of the act use words of present meaning when referring to the population which shall entitle certain cities to organize thereunder, but a simple inspection of its language demonstrates that it only means the future population which those cities must have that are to elect two or three or four councilmen according to the apportionment made by the act. *Barnes v. Kirksville*, 270.
16. **Commission Form of Government: Special Law.** The Act of 1913, authorizing cities of the third class, after having adopted it, to elect a mayor and two, three or four councilmen at large, is not a special or local law. Both in its title and body, its words of classification according to population are applicable to all cities which now do or in the future may fall within these specifications. *Ib.*
17. ———: **Fifth Class of Cities.** The said act does not alter the preexisting classification of a city adopting it as one of the third class, but leaves it, and all other cities which may adopt its provisions, in the same class in which they belonged prior to its enactment. It merely gives to them, for purposes of administration, similar governmental powers and functions, and expressly provides that all these new methods of administration may be surrendered and those which such cities formerly had may be resumed, at any time, at the option of the voters. It does not create a fifth class of cities. *Ib.*
18. **Commission Form of Government: Not Sovereignties.** Municipalities which have adopted the statute providing for commission form of government and are governed by commissioners are in no sense sovereignties, and do not fall within the constitutional provisions apportioning the powers of sovereign States. *Ib.*
19. **Revenue: As Used in Constitution.** The words "State revenue" used in section 7 of article 11 of the Constitution, requiring at least "twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools," refer back to the words "ordinary revenue of the State," used in section 6 of said article, for their definition; but neither expression affords a clear-cut guide as to what income of the State is included. *State ex rel. v. Gordon*, 394.
20. ———: **Means Ordinary Revenue.** The word "revenue" as used in the Constitution and in the Appropriation Act of 1915 is limited by the word "ordinary," for both instruments use the words "ordinary revenue" in referring to the appropriations for the support of the public schools; and every appropriation act since 1877, except that of 1895, has used either the words "ordinary State revenue" or "ordinary revenue;" and so historically and lexically the word "revenue" when used in connection with an appropriation for the support of public school means "ordinary revenue"—that is, revenue or income arising from usual methods of taxation. *Ib.*
21. **Title of Constitution Article.** The title of an article of the Constitution in which a certain section is found is, in a legal sense, no part of said section and cannot be used to amplify or restrain its meaning; but it may be properly considered in determining the purpose of the framers of the instrument in

CONSTITUTIONAL LAW—Continued.

classifying the section—under the general rule that a title is presumed to express the intent of a law unless plainly contradicted by its body. And, hence, the fact that the section of the Constitution providing that no business corporation shall be created unless the persons named as corporators shall, at or before the filing of the articles of association, pay into the State Treasury, the fees therein specified, is found in the article entitled, "Revenue and Taxation," authorizes the conclusion that the title indicates the nature of that payment to be that of a tax, and not a mere fee for clerical services. *State ex rel. v. Roach*, 435.

22. **Appellate Jurisdiction: Title to Real Estate: Condemnation: Easement.** A suit by a city to condemn private land for sewer purposes involves title to real estate. Even though a cursory view may suggest that only the easement and not the fee is affected, yet it remains true that, though the fee remain in the owner, his right to the use and exclusive possession of the land is either lessened or taken away, and as a consequence the title is affected to the extent of the injury. *Moberly v. Lotter*, 457.
23. ———: ———: **Writ of Error Issued by Court of Appeals: Transfer to Supreme Court.** After a writ of error has been timely and properly sued out in a court of appeals in a case of which such court does not have appellate jurisdiction (in this case, because it involves title to real estate), that court has power to transfer the case to the Supreme Court, which will take jurisdiction in the same manner as it would had an appeal in the case been erroneously certified by the trial court to the Court of Appeals and by that court transferred to this court. [GRAVES, J., and WOODSON, C. J., dissenting.] *Ib.*
24. ———: ———: ———: **Constitutional Limitations and Statute.** The definitions of the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals contained in the Constitution and the limitation upon the right of either to issue writs of error to cases reviewable by it, must be construed in connection with the power given by the Constitution (Section 6 of Amendment of 1884 to Article 6) to the General Assembly to provide by legislation for the transfer of cases from the one court to the other, and that has been done by Section 3938, Revised Statutes 1909, directing the course to be pursued in case the writ is sued out in a court not having appellate jurisdiction. The authority conferred by this statute is not an exercise of jurisdiction, but of a power to determine whether or not jurisdiction exists, and in its absence, as determined by the court, to transfer the case to the court invested with power to review it. The constitutional provision defining the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals applies as well to writs of error as to appeals. *Ib.*
25. **Condemnation: Taking of Fee.** Statutes authorizing the fee of land taken for a public sewer to be vested by the judgment in the city, violate no constitutional provision. *Ib.*
26. **Constitutionality of Statute: Not Timely Raised.** The Supreme Court on appeal will not consider the constitutionality of a statute upon which plaintiff has bottomed his case, where defendant did not raise the question of its invalidity until he had lost his case and came to file his motion for a new trial.

CONSTITUTIONAL LAW—Continued.

Ordinarily a constitutional question must be lodged in a case as soon as is procedurally possible after the statute, order, judgment or thing alleged to be unconstitutional appears in the case. *Deiner v. Sutermeister*, 505.

27. **Constitutional Statute: Implied Legislative Limitation.** An implied limitation on the Legislature's power to enact a certain statute must be so clear and unmistakable as to make possible no other reasonable construction of the language used than that the power to enact the statute does not exist. A possible inference of its non-existence is not sufficient. *State ex rel. v. Burton*, 711.
28. ———: ———: **Twenty-five Cent Road Tax: Expended by County Court.** The provision of section 71 of article 10 of the Constitution authorizing the county court to levy and collect a tax of not more than twenty-five cents on each hundred dollars' valuation, to be used for road and bridge purposes, and for no other purpose whatever, does not give the county court exclusive power to expend the fund, and does not contain a limitation upon the power of the Legislature to authorize the money so raised to be expended by the commissioners of a special road district so clear and unmistakable as to justify the conclusion that such power does not exist. *Ib.*
29. ———: ———: **Expended by County Court: Administration of County Affairs.** Section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is not unconstitutional on the theory that the Constitution created county courts to transact the business of the counties and vested them with express jurisdiction to construct and repair roads, even though it contains an implied limitation that the road tax fund be expended under the direction of those courts. *Ib.*
30. ———: **Legislature: Power of Taxation: Instrumentalities.** The power to tax and to appropriate taxes is vested in the Legislature, and may be exercised within its discretion when not violative of an express provision of the Federal or State Constitution, and that power, in the absence of such restrictions, extends to a determination of the time, the amount, the nature and the purpose for which the tax is to be levied, and the creation of the agencies or instrumentalities for its collection and disbursement. *Ib.*
31. ———: **Class Legislation: Special Road Districts.** Sections 10594 and 10591, Revised Statutes 1909 (repealed and reenacted in 1913, Laws 1913, pp. 674, 675), are not unconstitutional as class legislation. They apply to all road districts which may be organized as bodies corporate and are conducted in conformity with their provisions. *Ib.*
32. ———: ———: ———: **Indefinite Territory.** The fact that much or little of the territory of the county may be included in a special road district does not render invalid the statutes authorizing their organization. *Ib.*
33. ———: **Special Road Districts: Public Purpose.** Taxes expended by a special road district on public highways are used for a public purpose. *Ib.*

CONSTITUTIONAL LAW—Continued.

34. ———: ———: **Uniform Taxation.** Special road district statutes operate alike upon all persons within the district, and do not violate the rule for uniformity of taxation. *Ib.*
35. ———: ———: **Collection of Taxes Within Cities.** The statutes, in authorizing the levy and collection of taxes in special road districts outside of cities, do not violate that part of section 10 of article 10 of the Constitution which forbids the Legislature to impose taxes and appropriate money levied and collected by city authorities to uses and purposes outside of such cities. *Ib.*
36. ———: ———: **Lending Credit, Etc.** The statutes creating and governing special road districts do not violate sections 46 and 48 of article 4 of the Constitution which prohibit the Legislature from granting public money to individuals, or municipal or other corporations, and from authorizing any municipality or other political corporation from lending its credit in aid of any individual or corporation. *Ib.*
37. ———: ———: **Maximum Rate of Taxation.** Special road districts are not included within the provisions of sections 11 and 12 of article 10 of the Constitution which fix the maximum rates of "taxes for county, city, town and school purposes." *Ib.*

CONTRACTS.

1. **Insurance Company: Contract with Agent Prior to Organization.** A contract made with the chairman of the "corporators" or organization committee of an insurance company, to pay an agent a certain commission on all subscriptions he obtains to the company's corporate stock, having been made before its organization, is not binding on the company, or enforceable against it. *Taylor v. Ins. Co.*, 283.
2. ———: ———: **Notice of Limited Powers.** The "corporators" of an insurance company prior to its organization, are, under the statutes, agents of limited powers, and any one dealing with them must do so at his peril; and an agent, who enters into a contract with the chairman of the organization committee, who afterwards becomes its president, to obtain subscribers to its proposed capital stock, for a certain commission, is chargeable with notice that such chairman had no power to bind the corporation by such contract, for he is also chargeable with notice that under the statutes there can be no corporation until after the stock is subscribed, and that all the cash received from subscribers to stock must go into the company's treasury. *Ib.*
3. **Agent: Failure to Sell Stock at Agreed Price.** Where plaintiff agreed to sell stock at \$200 for each share of \$100 par value, and for his services was to receive ten per cent of the amount he so sold, he cannot, in a suit on the contract, and not in *quantum meruit*, recover for stock sold at less than \$200 a share. And an agreement by a trust company to put up, for incorporation purposes merely, an amount of money equal to \$200 per share of the stock sold to it, with the understanding that one-half of it is to be returned to it after the company is duly incorporated, cannot be twisted into a sale at \$200 per share. *Ib.*
4. ———: **Action on Specific Contract: Quantum Meruit.** Where plaintiff's pleadings are bottomed on a specific contract

CONTRACTS—Continued.

and the case is tried on that theory, a judgment cannot stand on *quantum meruit*. *Taylor v. Ins. Co.*, 283.

5. **Accident Insurance Policy and Supplement: Construing Together.** Where by the main policy an insurance company promised to pay ten thousand dollars to insured's mother in case of his accidental death "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running-board of railway or street railway cars)," and in the concurrent and separately signed supplement, supported by the one stipulated premium and attached to said main policy, promised to pay to insured five thousand dollars in case of the death of his mother "while riding as a passenger in a railway passenger car," the court cannot, in a suit by the insured to recover for the accidental death of his mother, which occurred as she was attempting to pass, in the nighttime, from one car of a fast moving train, across the unvestibuled platforms, to another car, consider the two contracts as one, and so construe them together as to hold that, though the covenants are independent and divisible, the words "while riding as a passenger in a railway passenger car," standing alone, mean while riding anywhere on the car, but when read in connection with the words contained in the main policy they do not mean while riding on the platform of a passenger car, but only inside the car; and by so construing the two instruments together, and thereby reaching the conclusion that the insured could not recover, the Court of Appeals violated the rule announced in *Trabue v. Insurance Co.*, 121 Mo. 75, and *Owings v. McKenzie*, 133 Mo. 325. The subject-matters of the two contracts are distinct, and they cannot be held to be one contract for the purpose of limiting the language of the one by the terms of the other. *State ex rel. v. Ellison*, 580.

CONVEYANCES.

1. **Wrongful Delivery: Unauthorized Opening of Letter.** The owner of land resided in Cincinnati, and his agent and brother resided in Missouri and was sick at the house of a friend and while there some kind of a trade was made for the land. The agent wrote the owner to make out a deed of the land, naming this host's son as grantee, inclose it in an envelope addressed to the agent, and inclose that envelope in another addressed to the agent's host. That was done, and when the letter was received by the host he opened both envelopes and immediately placed the deed of record without the knowledge or consent of either the agent or owner. *Held*, that the possession and record of the deed was wrongful, but that does not determine the rights of a subsequent innocent purchaser for value, even though the deed itself has been cancelled for non-delivery. *Leonard v. Shale*, 123.
2. ———: **Good Faith of Subsequent Purchaser.** A purchaser for a valuable consideration from the apparent record owner in possession of the land, with no knowledge that the deed to the apparent owner had been wrongfully obtained by him and placed of record without the owner's knowledge or consent, and with no such knowledge as would put him on inquiry, is not chargeable with bad faith. Nor does the fact that he had heard, before he made a loan on the land, that such apparent record owner had gotten a farm at a bargain, impugn his good faith in making the loan. *Ib.*

CONVEYANCES—Continued.

3. ———: Estoppel: Depositary: Violated Confidence: Innocent Third Parties. No title passes to the grantee who wrongfully obtains or steals a fully executed deed and places it of record; but the grantor, as to subsequent grantees, may be estopped to dispute the validity of a conveyance by said grantee, by the conduct of the grantor in placing a fully executed deed in the hands of the father of such grantee, as his depositary, or by the conduct of the grantor after he knew such deed had been delivered and placed of record. So that where the owner's agent, residing at the residence of the grantee's father, wrote the owner to make out a fully executed deed, inclose it in an envelope addressed to the agent and inclose that in another envelope addressed to the father, and that was done, and when the letter came both envelopes were opened by the father and the deed immediately placed of record without the knowledge or consent of the grantor or his agent, and the agent learned the facts soon after the deed was placed of record and the grantee and father went into possession and while in possession borrowed \$1500 from defendant, who knew nothing of the fraudulent facts, and secured the loan by a deed of trust on the land, and the plaintiff (the original grantor) knew for six months before defendant made the loan and obtained the deed of trust that the undelivered deed had been recorded, the plaintiff is estopped to dispute the validity of the deed of trust, because (1) he is chargeable with the knowledge of his agent who was in charge of the land at the time the deed was obtained, and (2) because he made the grantee's father the depositary of the deed and if he violated his confidence innocent third parties should not suffer, and (3) because he did not take prompt action, after he knew the deed had been recorded, to divest the grantee of his apparent record title. Ib.

4. ———: ———: Prompt Action. The real owner of land cannot knowingly permit the title to stand upon the record in the name of another, and then defeat a mortgage placed thereon by such apparent owner, if the mortgagee acts in good faith and without knowledge of the true facts in taking the lien. A delay of six months by the grantor after he discovers that his fully executed deed had surreptitiously and wrongfully, without actual delivery, been placed of record, to bring proper proceedings to have the title divested out of the grantee, will estop him from enforcing his title as against a mortgagee who, without any knowledge of the fraud, in good faith in the meantime loans money to the apparent record owner. Ib.

CORPORATIONS.

1. Insurance Company: Organization: Agent to Sell Stock. Under the statutes (Secs. 6895-6902, R. S. 1909) a charter of an insurance company cannot be adopted until its stock is subscribed, nor is there any corporation until the amount of the proposed stock has been subscribed. The persons designated as "corporators" in those statutes are only given power to open and keep open books to take subscriptions to the capital stock; they have no stock for sale, and are not authorized to sell stock upon the market or otherwise; nor do they have power, in behalf of the corporation, to enter into a contract with an agent to sell stock or proposed stock. Taylor v. Ins. Co., 283.

2. ———: ———: Purpose of Statute. The statutes mean that the cash paid or secured notes given for the stock of an insurance company, at the time of its organization, shall go into its corporate treasury, and shall not be depleted or

CORPORATIONS—Continued.

diminished by percentages paid to an agent of the corporators for securing subscribers. And they apply in the same way to any surplus obtained from subscribers of the stock. *Taylor v. Ins. Co.*, 283.

3. ———: **Contract with Agent Prior to Organization.** A contract made with the chairman of the "corporators" or organization committee of an insurance company to pay an agent a certain commission on all subscriptions he obtains to the company's corporate stock, having been made before its organization, is not binding on the company, or enforceable against it. *Ib.*
4. ———: **Notice of Limited Powers.** The "corporators" of an insurance company prior to its organization, are, under the statutes, agents of limited powers, and any one dealing with them must do so at his peril; and an agent, who enters into a contract with the chairman of the organization committee, who afterwards becomes its president, to obtain subscribers to its proposed capital stock, for a certain commission, is chargeable with notice that such chairman had no power to bind the corporation by such contract, for he is also chargeable with notice that under the statutes there can be no corporation until after the stock is subscribed, and that all the cash received from subscribers to stock must go into the company's treasury. *Ib.*
5. **Incorporation Tax: Distinction Between Capital and Capital Stock.** In determining the amount of money which a corporation must pay to the Secretary of State for its certificate of incorporation, it is not material to accurately define, and distinguish the difference in meaning of, "capital" and "capital stock." The amount of money required by law to be paid into the corporation's treasury in money or money's worth for the prosecution of its business when organized, may not improperly be termed its capital stock, but its also constitutes its assets or capital, because it is its actual and only property. *State ex rel. v. Roach*, 435.
6. ———: **A Tax and Not Fees.** The money required to be paid by incorporators as a prerequisite to the issuance of the articles of incorporation is not a fee for clerical services to be rendered by the Secretary of State, but is a tax levied by the State on a corporation at its creation, for revenue purposes. And being a tax they must pay in proportion to the true value of its actual assets taken as capital stock, whatever be the proposed capitalization—the ruling, however, not being applicable to business companies incorporated in pursuance to statute upon the payment into the corporate treasury of fifty per cent of their authorized capital stock. *Ib.*
7. ———: ———: **Title of Constitution Article.** The title of an article of the Constitution in which a certain section is found is, in a legal sense, no part of said section and cannot be used to amplify or restrain its meaning; but it may be properly considered in determining the purpose of the framers of the instrument in classifying the section—under the general rule that a title is presumed to express the intent of a law unless plainly contradicted by its body. And, hence, the fact that the section of the Constitution providing that no business corporation shall be created unless the persons named as corporation shall, at or before the filing of the articles of association, pay into the State Treasury, the fees therein spe-

CORPORATIONS—Continued.

cified, is found in the article entitled, "Revenue and Taxation," authorizes the conclusion that the title indicates the nature of that payment to be that of a tax, and not a mere fee for clerical services. *Ib.*

8. ———: Amount. Where the affidavit of the incorporators attached to the articles of association states that the true value of the money and property to be taken in payment of the capital stock of the corporation is \$91,000, the incorporators must pay an incorporation tax on that sum, and cannot satisfy the demands of the law by applying for the formation of a corporation with an authorized capital stock of \$50,000 and tendering a fee based on a capitalization of \$50,000.

Held, by WOODSON, C. J., dissenting, that the incorporators of a business corporation may arbitrarily capitalize their company for any amount they deem proper, within the limits prescribed by the statutes; that the board of directors may declare dividends out of any surplus money the corporation may have on hand over and above its capitalization, including money contributed by its stockholders after the incorporation has been effected; that the mere fact that the corporators, at the time of applying for incorporation, announced their intention to use in the business of the company any more money or property than that represented by its capitalization would not change the legal status of the company, capitalization or shares of stock, nor would the fact that such an announcement was contained in the application for the charter; and that the announcement in the articles that they intended to use \$41,000 worth of property over and above the capitalization in the business of the company, was wholly voluntary, constituted it no part of the capitalization, and did not authorize the Secretary of State to assess an incorporation tax thereon. *Ib.*

9. ———: ———: Surplus. A ruling requiring a company to incorporate for the true value of its property taken as capital stock as shown by the articles of agreement will not prevent it from accumulating a surplus. After a company is incorporated, the State does not concern itself with the manner in which it conducts its business, whether successfully or otherwise, provided it complies with the law. *Ib.*
10. Liability for Malicious Assault by Agent Upon Patron. A corporation, an express company and a common carrier, which had delivered a consignment of fruit to plaintiff, who, after refusing on account of a shortage in the shipment to sign a receipt therefor until the company's agent would present his claim for an allowance for the shortage, returned at the agent's request, given by telephone, to defendant's office for the purpose of discussing a settlement of the matter, and when near the office was met by said agent, who demanded that plaintiff then and there sign said receipt, and when plaintiff under protest was in the act of signing it, suddenly drew a pistol and without warning shot plaintiff, is liable in civil damages, both actual and punitive, to plaintiff for the injuries resulting from said assault; and a second count in the petition in which knowledge by defendant of the agent's violent temper, quarrelsome disposition and unfitness for his position, in addition to such other facts, is charged, also states a cause of action.

CORPORATIONS—Continued.

Held, by WOODSON, C. J., dissenting, with whom BLAIR, J., concurs, that the agent's act was a crime, personal to himself, in no way within the scope of his agency, and could not be authorized by the company, because unlawful, and being wholly unauthorized and unauthorized, the company is not liable in civil damages for the injuries to plaintiff caused by his murderous assault. *Maniaci v. Express Co.*, 633.

COUNTY COURT.

1. **Twenty-five Cent Road Tax: Expended by County Court.** The provision of section 11, of article 10, of the Constitution authorizing the county court to levy and collect a tax of not more than twenty-five cents on each hundred dollars' valuation, to be used for road and bridge purposes, and for no other purpose whatever, does not give the county court exclusive power to expend the fund, and does not contain a limitation upon the power of the Legislature to authorize the money so raised to be expended by the commissioners of a special road district so clear and unmistakable as to justify the conclusion that such power does not exist. *State ex rel. v. Burton*, 711.
2. **Expended by County Court: Administration of County Affairs.** Section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is not unconstitutional on the theory that the Constitution created county courts to transact the business of the counties and vested them with express jurisdiction to construct and repair roads, even though it contains an implied limitation that the road tax fund be expended under the direction of those courts. *Ib.*

COURTS.

1. **Supreme Court: Publication of Docket in Newspaper.** The publication of the docket of the Supreme Court or of any division thereof, in a local newspaper or any newspaper, at public expense, is not required by the statute. The amendment of the statute in 1889 (Sec. 2079, R. S. 1909) took away the necessity for such publication. It is, therefore, ordered that the clerk shall not hereafter cause the docket to be published in a newspaper at public expense. *In re Publishing Docket*, 48.
2. **Construing Statute: Convenience.** Likelihood of delay in case furniture for the new capitol cannot be purchased before the meeting of the next Legislature unless it is held that the present State Capitol Commission Board is invested with power to purchase furniture, is an argument from convenience, which has a place in construing ambiguous statutes, but none in construing a clear and unambiguous one. Courts have no power to reconstruct statutes merely for the purpose of making them conform to their ideas of wisdom. *Stephens v. Gordon*, 206.
3. **Appeal: Failure to File Abstract: Rule of Court.** The rules of the Supreme Court made under the direct authority of a statute, have practically the binding force and effect of a statute. And while the court has power to change its rules, the change ought to be in substance, and the rule should not be nullified by a collateral attack. *Bank v. Kropp*, 218.

COURTS—Continued.

4. ———: ———: **Penalty Fixed by Rule of Court.** There being no specific penalties attached by section 2048, Revised Statute 1909, to a failure of appellant, who has in due time filed a short-form transcript, to file a printed abstract in time, the court is empowered to fix the penalties by rule of court; and Rule 16 fixes the penalty at dismissal of the appeal, or at a continuance to the next term, and not at affirmance of the judgment. *Ib.*
5. **Judgment of Probate Court: Collateral Attack.** As to all matters of administration of estates, the orders, judgments and proceedings of the probate court, made in furtherance of the statutory powers developed upon it, are not subject to collateral attack, unless it affirmatively appears in some portion of the entire record that the steps necessary to the acquisition of jurisdiction were not taken. *Harter v. Petty*, 296.
6. ———: ———: **Silence of Record.** Mere silence of the record is not sufficient to overcome the presumption that a given judgment of a probate court was rendered after jurisdiction attached. *Ib.*
7. **Public Service Commission: Findings As to Necessity of Interchange Railroad Track.** The finding of the Public Service Commission that the evidence discloses such a pressing public demand or necessity for the construction of an interchange track by two railroads at the point where their lines cross each other as to warrant the expenditure of the amount of money which the evidence shows the track will cost, are not final and conclusive upon the courts authorized to review its actions. *Railroad v. Public Service Comm.*, 333.
8. ———: **Limitations Upon Powers.** The origin and powers of the Public Service Commission are purely statutory, and it has no authority save that given it by express statute, and save such implied authority as may be necessary to carry into effect the authority expressly given. *Ib.*
9. **Administration: Probate Courts: Concurrent Jurisdiction: To Establish Demands.** Section 34 of article 6 of the Constitution, providing for the establishment of probate courts and defining the bounds of their jurisdiction, did not vest in such courts exclusive jurisdiction, but only concurrent jurisdiction with other courts of record, to entertain suits against administrators for the establishment of demands against estates. And section 197, Revised Statutes 1909, in terms certain, authorizes the establishment of such demands in the circuit court. *State ex rel. v. Holtcamp*, 347.
10. ———: **Establishing Demands in Circuit Court: Exhibition.** The due service of the summons upon the administrator, in an action begun in the circuit court within the time specified by statute after the issuance of letters of administration, is an exhibition of the demand sued on against the estate; and by the filing of the action and service of summons within such statutory period, the circuit court acquires jurisdiction (1) of the subject-matter, or demand, (2) of the person of the legal

COURTS—Continued.

representative of the estate, and (3) of the estate, in so far as the demand and the right to have it determined are concerned. *State ex rel. v. Holtcamp*, 347.

11. ———: ———: ———: **Ousting Jurisdiction.** And jurisdiction of the circuit court having lawfully attached can be ousted or divested only by statutes clearly so providing. *Ib.*
12. ———: ———: **Final Settlement in Probate Court: Action Still Pending in Circuit Court.** The probate court is without jurisdiction to order the administrator to make final settlement of the estate so long as an action on a demand, timely brought, in which service of summons was timely obtained, is pending undecided in the circuit court, or on appeal to an appellate court; and a final settlement, made two years after notice of administration given, and approved by the probate court, and an order directing distribution and discharging the administrator, made while such suit is still pending in either the circuit or appellate court, are likewise void, nor can the payment of a claim established by the action in the circuit court be defeated by the prior approved final settlement and discharge. *Ib.*
13. ———: ———: ———: **Estate Not Fully Administered: Jurisdiction.** The probate court has no jurisdiction to determine the liability of the estate upon a demand made the basis of an action timely and properly brought in the circuit court against the administrator, and until the estate's liability thereon is determined the estate is not fully administered, and the probate court has no jurisdiction to determine the estate is fully administered until its liability upon that demand is determined. *Ib.*
14. ———: ———: **Collateral Attack.** Full administration of the estate must really exist, regardless of the probate court's decision thereon, else a settlement, as a final one, is void, and subject to collateral attack. *Ib.*
15. ———: ———: ———: **Demands Pending in Any Court.** The probate court is without jurisdictional power to approve a final settlement as long as in fact demands are legally pending and undisposed of, either in the probate court or other courts of record, and there are available assets for their satisfaction. *Ib.*
16. ———: ———: **Unlawful: Discharge of Administrator.** If the purported final settlement, approved by the probate court, was unlawful, for that the estate had not been fully administered, there being demands legally pending and assets out of which they may be satisfied, and is for that reason to be considered in legal effect an annual settlement, the administrator is at all times after such purported final settlement the legal representative of the estate, unless previously lawfully and finally discharged on other grounds, and the estate is bound by all valid judgments in cases timely brought against him in any court of record in which he was duly served. *Ib.*

COURTS—Continued.

17. ———: Judgment: Refused Classification: Mandamus: Proper Remedy. Where a probate court has refused to hear a matter over which it has jurisdiction, on the ground that it had no such jurisdiction, this court will issue its writ of mandamus to compel it to proceed. So that where the Supreme Court reversed a judgment of the circuit court in a suit brought against the administrator of an estate, and directed judgment against him in a definite amount, and the circuit court in compliance with that direction entered judgment and directed certification thereof to be made to the probate court, and that court refused to act in the matter on the ground that the administrator had long previously made final settlement, which has been approved, and had been discharged, mandamus is the proper remedy to compel the probate court to classify the demand and proceed in the matter, because, if for no other reason, it is a proper method to compel the carrying out and giving effect to the judgment which the Supreme Court directed and commanded; and because (BOND, J., concurring) there was no necessity for plaintiff to resort to other modes of redress, which might be applicable except for the conclusiveness of that judgment. *Ib.*
18. Legislative Jurisdiction. As to a constitutionally recognized court, it is a general rule that the Legislature can neither add to nor subtract from the jurisdiction provided for it by the Constitution. And the enumeration in the Constitution of certain specific powers, with no hint of others to be added by law, it to be considered as an exclusion of all other powers. *State ex rel. v. Locker*, 384.
19. Probate Courts: Power to Issue Habeas Corpus and Injunction Writs. The Constitution enumerates the matters of which probate courts shall take cognizance, and neither a proceeding in *habeas corpus* nor a writ of injunction is among them, nor is either akin to the subjects named. The Constitution confers no power upon probate courts to issue writs of *habeas corpus* or injunction; and so much of section 2442, Revised Statutes 1909, as attempts by the use of the words "some court of record" to confer upon probate courts such power, is unconstitutional and void. *Ib.*
20. Habeas Corpus: What Courts May Issue. The Supreme Court, courts of appeals, circuit courts and county courts (when aided by statute) have a constitutional warrant for issuing writs of *habeas corpus*, but the Constitution confers no such power on probate courts, nor does it authorize the Legislature to confer it. *Ib.*
21. Public Service Commission. The Public Service Commission is not a court. *Macon v. Public Service Comm.*, 484.
22. Certiorari: Quashing Judgment of Court of Appeals. The Supreme Court has constitutional authority to quash the judgment of a court of appeals in any case wherein its judgment has been the result of its refusal to follow the last previous ruling of the Supreme Court upon any matter of law or equity involved in the case. *State ex rel. v. Ellison*, 604.

COURTS—Continued.

23. ———: ———: **Statement of Facts.** Upon *certiorari* directed to a court of appeals, the Supreme Court can confine itself to the facts found by that court: this, upon the presumption that, where that court has undertaken to state the facts, it has stated all the facts of record upon the question in issue. *State ex rel. v. Ellison*, 604.
24. **Listing of Cases for Trial: Rules of Court.** In view of the facts set out in the opinion it is held that relator is not entitled by writ of mandamus to compel the presiding judge of the circuit court of Jackson county to make an immediate assignment of and set for trial her suit against the Metropolitan Street Railway Company et al. pending in said court. *State ex rel. v. Johnson*, 662.

CRIME AGAINST NATURE.

1. **Embraced by Statute.** The statute (Laws 1911, p. 198) declaring that "every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished," etc., makes criminal the act of a man in wickedly and feloniously inserting his sexual organ into the mouth of a woman. Whether or not such act was at common law included in the general terms "crime against nature" is beside the question in view of the words "with the sexual organs or with the mouth" added to the statute in 1911, which were intended to include certain acts which the general common-law terms did not embrace, among others the said act. *State v. Katz*, 493.
2. **Evidence: Of Collateral Crime.** Evidence of a collateral crime which has a logical connection with the crime directly involved and is so linked with it as to constitute it a part of the continuous accomplishment of a fixed and common design, is admissible. So that where defendant is charged with the abominable crime against nature and the evidence shows that, while prosecutrix and a man were seated in a park near midnight they were accosted by defendant and two accomplices, who falsely represented themselves as private detectives, and while the accomplices, under the guise of an arrest, took the man to one end of the park, the defendant forcibly took her to another part and there ravished her and after forcibly detaining her for sometime inserted his sexual organ in her mouth, evidence that, after the accomplices had returned and they had outraged her in the same way, the three took her to the rear of an abandoned saloon, an hour and a half or two hours after they had first accosted her in the park, and there again assaulted her in the same way, was admissible, to establish a conspiracy and to prove that all that was done was but a part of a fixed, single and common design. *Ib.*
3. ———: ———: **Motion to Elect.** Nor was it error on the part of the trial court to refuse to compel the State, after the evidence of the second assault was in, to elect upon which assault it would go to the jury. *Ib.*

CRIME AGAINST NATURE—Continued.

4. **Consent as Defense: Instruction.** Consent on the part of the woman to the insertion by defendant of his sexual organ in her mouth is no defense to a charge of the detestable and abominable crime against nature; nor can an instruction which tells the jury that it was immaterial whether the person so used or abused consented thereto or not, be condemned as unnecessary, or as erroneous, on the ground that, if prosecutrix consented, she was an accomplice, in which event corroboration of her testimony was necessary, in a case in which there is no evidence tending to show consent, and corroboration therefore was unnecessary, and the motion for a new trial contains no specific assignment on the subject. *Ib.*
5. **Incredible Evidence.** Although the facts of a case reveal such a state of degradation and indecency as to challenge credulity, they will not be held to be incredible and opposed to human experience, if prosecutrix's testimony is corroborated and the punishment imposed by the verdict is so moderate as to relieve the jury of every imputation of passion and prejudice; for legislative enactments against crimes against nature and the transcripts of courts attest the fact that such crimes are within human experience. *Ib.*

CRIMINAL LAW.

1. **Evidence: Homicide: Corroboration of Irrelevant Statements.** Copies of a periodical and catalogue found among deceased's effects, the one advocating free love and the other containing a price list of articles designed to prevent conception, are not admissible for the purpose of corroborating defendant's testimony that she believed deceased had taken away her unmarried sister-in-law for immoral purposes, or of elucidating the state of her mind at the time she shot deceased. *State v. Cariou, 82.*
2. **Instruction: Defining Heat of Passion.** An instruction for murder in the second degree is not erroneous because it does not define the phrase "heat of passion." *Ib.*
3. **———: Homicide: Manslaughter in Fourth Degree: No Provocation.** The giving of an instruction for manslaughter in the fourth degree is authorized only when the evidence shows that an assault has been committed or personal violence has been inflicted upon defendant, either of which constitute what is termed "lawful provocation," the presence of which will reduce murder to manslaughter. But testimony that deceased had seduced defendant's unmarried sister-in-law, who had been a member of her household; that he had placed pernicious literature in her hands, that he had abducted her from defendant's home under promise of marriage and had returned without her, or his remark to defendant when she made inquiry concerning her sister-in-law just before the shooting that he had taken her to a place to have pleasure with her, is not evidence of lawful provocation, and will not authorize an instruction for manslaughter in the fourth degree. *Ib.*

CRIMINAL LAW—Continued.

4. ———: Mental Incapacity: Covered by Others Given. It is unnecessary to give an instruction submitting to the jury the question of defendant's mental capacity necessary to relieve her from liability for the commission of a crime, if the court has already at the request of the State given an instruction properly presenting the entire matter. *State v. Cariou*, 82.
5. Pleading: Former Acquittal: Habitual Criminal. Ordinarily the plea of *autrefois acquit* or *autrefois convict* should set out fully and accurately the former indictment, because the identity of the two offenses is the very gist of the plea, and because, before it is availing, the former conviction or acquittal must be had upon a valid indictment, and such identity and validity cannot otherwise be made to appear. But where the plea is directed to an indictment which alleges a former conviction and thereby seeks to charge defendant as an habitual criminal, it is not necessary to set out in the plea more than the indictment itself is required to contain, and to sustain the charge of being an habitual criminal it is required to allege only in general terms the conviction, date thereof, sentence, imprisonment and discharge upon compliance with the sentence. *State v. Collins*, 93.
6. Habitual Criminal: No Crime. The statute does not authorize a conviction upon a charge of being an habitual criminal; it does not make an habitual criminal habit an offense. It only provides a severer punishment for the crime committed because of defendant's persistence in criminal conduct. *Ib.*
7. ———: Twice in Jeopardy. The statute prescribing a greater punishment for a second offense than for the first does not put defendant twice in jeopardy of conviction or punishment for one offense. It simply prescribes a severer punishment for the subsequent offense. Its penalties cannot be inflicted unless he is convicted of the second or a subsequent offense, nor unless he has previously been convicted of a specific crime. *Ib.*
8. Pleading: Habitual Criminal: Former Acquittal: Plea of Former Jeopardy. Where the indictment charges defendant with the crime of larceny and with having been convicted of a former larceny in 1909, a plea to the indictment to the effect that he is being twice put in jeopardy of the offense of being an habitual criminal, and should be discharged, for that he was in 1911 acquitted under an indictment charging he was an habitual criminal, is not sufficient, for the reason that it is not distinctly pleaded that he was acquitted of the crime then charged to him. If he was convicted of the crime itself, but was acquitted on the charge of having been formerly convicted, this fact should have been distinctly pleaded, and it is not. *Ib.*
9. Confession: Law of Case. A ruling upon a former appeal that a written confession obtained by the police captain and other officers from defendant was as a matter of law not voluntary and therefore inadmissible, becomes the law of the case on a second trial, unless a different state of facts is shown. *State v. Powell*, 100.

CRIMINAL LAW—Continued.

10. ———: **Swearing Away Legal Defects.** Legal defects which arose from the State's affirmative proof and which as a matter of law destroyed the voluntary character of defendant's alleged confession on the former trial, cannot be sworn away by the same witnesses upon the second trial without a commission of perjury. If the facts pertaining to the voluntary character of the confession were fully developed at the first trial, a holding that, upon the State's own showing, the confession was not voluntary and therefore inadmissible, became the law of the case on a second trial. *Ib.*
11. ———: **Other Oral Confessions.** But the inadmissibility of that written confession, obtained by policemen after continually "sweating" defendant for eleven hours, does not affect the admissibility of a prior oral confession made to a special officer which was not involved in the former ruling. *Ib.*
12. ———: **Guilt Dependent Upon.** Considerations of justice demand that great caution should be used and great exactness required in determining the admissibility of a confession by defendant where without that confession there is no substantial evidence of his guilt; and especially should that caution be observed where the confession contains a statement of fact which is conclusively shown to be false. *Ib.*
13. **Manslaughter: By Automobile Driver: Sufficient Evidence.** Testimony that defendant was driving his automobile at a speed of fifteen to twenty miles an hour, at an intersection of two streets; that the view between him and the deceased pedestrian was unobstructed; that when deceased was ten or fifteen feet out in the street, after having left the sidewalk at the street intersection, and was walking in a straight direction, he was struck by the automobile and dragged twenty-five feet or more; that no warning or signal was heard; that deceased was apparently oblivious of the approach of the automobile until it was upon him; that going six miles an hour, as defendant testified, it could have been stopped in three or four feet, and that when defendant first saw deceased he was within three feet of him, and instead of stopping his car he swerved it in an effort to avoid hitting him, is sufficient evidence to support a verdict of manslaughter in the fourth degree based upon culpable negligence. *State v. Horner, 109.*
14. ———: ———: **Culpable Negligence: Definition.** An instruction defining "culpable negligence" as the failure to exercise "the highest degree of care which a very prudent and ordinarily skillful driver of an automobile would have used under the same or similar circumstances," and authorizing a conviction if the jury found that the death of the pedestrian at a street intersection resulted from the failure of defendant to exercise such "highest degree of care," is erroneous. *Ib.*
15. ———: ———: **Definition in Civil Code.** The statute (Laws 1911, pp. 330-331) authorizing a recovery of damages in a civil action for a failure to exercise "the highest degree of care," has reference to civil actions only, and in no sense is to be considered a part of the criminal code. *Ib.*

CRIMINAL LAW—Continued.

16. ———: ———: **Definition in Criminal Action.** Culpable negligence, as used in the statute (Sec. 4468, R. S. 1909) making the killing of a human being by the culpable negligence of another manslaughter in the fourth degree, is the omission to do something which a reasonable, prudent and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding each particular case. *State v. Horner*, 109.
17. **Crime Against Nature: Embraced by Statute.** The statute (Laws 1911, p. 198) declaring that "every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished," etc., makes criminal the act of a man in wickedly and feloniously inserting his sexual organ into the mouth of a woman. Whether or not such act was at common law included in the general terms "crime against nature" is beside the question in view of the words "with the sexual organs or with the mouth" added to the statute in 1911, which were intended to include certain acts which the general common-law terms did not embrace, among others the said act. *State v. Katz*, 493.
18. **Evidence: Of Collateral Crime.** Evidence of a collateral crime which has a logical connection with the crime directly involved and is so linked with it as to constitute it a part of the continuous accomplishment of a fixed and common design, is admissible. So that where defendant is charged with the abominable crime against nature and the evidence shows that, while prosecutrix and a man were seated in a park near midnight they were accosted by defendant and two accomplices, who falsely represented themselves as private detectives, and while the accomplices, under the guise of an arrest, took the man to one end of the park, the defendant forcibly took her to another part and there ravished her and after forcibly detaining her for sometime inserted his sexual organ in her mouth, evidence that, after the accomplices had returned and they had outraged her in the same way, the three took her to the rear of an abandoned saloon, an hour and a half or two hours after they had accosted her in the park, and there again assaulted her in the same way, was admissible, to establish a conspiracy and to prove that all that was done was but a part of a fixed, single and common design. *Ib.*
19. ———: ———: **Motion to Elect.** Nor was it error on the part of the trial court to refuse to compel the State, after the evidence of the second assault was in, to elect upon which assault it would go to the jury. *Ib.*
20. **Crime Against Nature: Consent as Defense: Instruction.** Consent on the part of the woman to the insertion by defendant of his sexual organ in her mouth is no defense to a charge of the detestable and abominable crime against nature; nor can an instruction which tells the jury that it was immaterial whether the person so used or abused consented thereto or not, be condemned as unnecessary, or an erroneous, on the ground

CRIMINAL LAW—Continued.

that, if prosecutrix consented, she was an accomplice, in which event corroboration of her testimony was necessary, in a case in which there is no evidence tending to show consent, and corroboration therefore was unnecessary, and the motion for a new trial contains no specific assignment on the subject. *Ib.*

21. ———: **Incredible Evidence.** Although the facts of a case reveal such a state of degradation and indecency as to challenge credulity, they will not be held to be incredible and opposed to human experience, if prosecutrix's testimony is corroborated and the punishment imposed by the verdict is so moderate as to relieve the jury of every imputation of passion and prejudice; for legislative enactments against crimes against nature and the transcripts of courts attest the fact that such crimes are within human experience. *Ib.*

22. **Felonious Assault: Wounding With Fists.** Under section 4483, Revised Statutes 1909, which is the maiming or wounding statute, it is not necessary to prove malice or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. The wounding and maiming may be done with the fists, and to support the charge it is not necessary to establish that the wounds were of a dangerous character, or such as are likely to produce death.

Held, by FARIS, J., dissenting, with whom WOODSON, C. J., and GRAVES, J., concur, that it is essential that an information drawn under Sec. 4483, R. S. 1909, aver the circumstances themselves which, if death had ensued, would have made the offense manslaughter, and that not having been done it is unnecessary to rule whether said statute can be violated by an assault with fists, or by the fists aided adventitiously by a finger ring.

Held, also, that if it be true, as announced by the majority opinion, that it is not necessary to establish that the wounds inflicted were of a dangerous character or such as are likely to produce death, it logically follows that any wound is, under said statute, sufficient to constitute felonious assault, and thereby the boundary line between common and felonious assault has been wiped out.

Held, also that said section 4483 denounces but two crimes: 1, The endangering of the life of another; and 2, The infliction of great bodily harm, either by (a) wounding, (b) maiming, or (c) disfiguring. *State v. Webb*, 672.

23. ———: ———: **Information.** Under said statute it is not necessary to allege the particular means by which the wounding or maiming was done, since this may be accomplished by any means. *Ib.*
24. ———: ———: ———: **Proof.** An assault may be charged to have been committed by different means, and proof of any will sustain the charge. *Ib.*

CRIMINAL LAW—Continued.

25. ———: ———: Evidence of Provocation. The court did not err in withdrawing from the jury's consideration testimony to the effect that the prosecuting witness, a school teacher, some hours before the assault with fists, had chastised defendant's son. That chastisement was neither a defense to nor in mitigation of the charge of felonious assault under Sec. 4483, R. S. 1909, where the wounding and maiming did not result in death. *State v. Webb*, 672.
26. ———: ———: Instruction: Presumption: Intention to Kill: Harmless. Evidence that defendant, wearing a heavy finger ring on one finger, struck the prosecuting witness with his fists, knocked him to a hard road, severely beat him on the head and over his eyes and ears and other parts of the body where great and permanent bodily injuries could have been easily inflicted, was sufficient to authorize an instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts," and that if they believe from the evidence the defendant assaulted the prosecuting witness "in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or to do him some great bodily harm." It is not required that a deadly weapon be used in order to justify such an instruction. *Held*, also, that, as this instruction was probably given more particularly in connection with the first count, which charged an assault with intent to kill or do great bodily harm, and defendant was acquitted on that count, and the second count charged wounding and maiming on which alone he was convicted, and nothing appearing to indicate that the severe injuries were not intentionally inflicted, he cannot complain of the instruction.
- Held*, by FARIS, J., dissenting with whom WOODSON, C. J., and GRAVES, J., concur, that the human fist, even when aided by a finger ring, is not judicially noticed as being a deadly weapon, and therefore the words of the instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts" were erroneous, since, under such circumstances, the law does not presume that death or great bodily harm is a natural or probable consequence. *Ib.*
27. False Pretense: Information. An information which plainly alleges (1) what the pretenses were, (2) to whom they were made, (3) that he to whom they were made relied upon them and, acting upon such reliance, was induced to and did part with his property, (4) that by means of such pretenses said property was obtained, (5) that the property so obtained was owned by the person named, (6) that its value was a named sum, (7) that said pretenses were made by defendant designedly and feloniously with intent to cheat and defraud, and (8) that said pretenses were false and that defendant knew they were false when he made them, states the component elements of the offense denounced by Sec. 4565, R. S. 1909, as amended by Laws 1911, and is sufficient. *State v. Young*, 723.
28. ———: ———: Misjoinder of Offenses: Different Statutes: Tests: Bar. The legal test of permitted joinder of offenses is

CRIMINAL LAW—Continued.

not whether the offenses charged in different counts of a single information as having been committed in different ways are, or are not, defined and denounced by different sections of the criminal code, but whether such offenses arose out of the same transaction, and are so far cognate that an acquittal or a conviction of the one would be a bar to a trial for the other. *Ib.*

29. ———: **Instruction: Under Abandoned Count.** An instruction in a prosecution for obtaining property by false pretense may be good under Sec. 4765, R. S. 1909 (as amended in 1913), but not good under Sec. 4565, R. S. 1909 (as amended in 1911); and if the information contains two counts, one charging a crime under section 4565, and the other, a crime under section 4765, and the latter count is abandoned, an instruction bottomed on section 4765 and possibly good when tested by it, is bad if it does not meet the requirements of section 4565. *Ib.*
30. ———: ———: **Deception.** Instructions in a prosecution for false pretense denounced by Sec. 4565, R. S. 1909 (as amended in 1911), must require that the person alleged to have been defrauded was deceived by the false pretenses made by defendant; and if they do not contain such a requirement, a conviction under that statute cannot stand. *Ib.*
31. ———: **Deception: Knowledge of Falsity.** If the person alleged to have been defrauded knew at the time that defendant's pretenses were false, no crime was committed under section 4565, Revised Statutes 1909. *Ib.*
32. ———: **Promise to Pay: Bank Check.** If at the time defendant offered his check on a certain bank in payment for the mules, the seller was informed that defendant had no funds in that bank, but defendant promised that by the time the check reached the bank the money to pay it would be there, and the check was accepted under such circumstances, no conviction under section 4565 can stand; for the effect of an agreement to have the money in the bank to pay the check on a future day, was to make of the alleged pretense but a mere promise, and so remove it from the category of crimes. *Ib.*
33. ———: ———: **Made in Good Faith.** Nor need the promise to pay at a future date be made in good faith; for the moment the alleged false pretenses are shown to be naked future promises, the prosecution under section 4565 inevitably and instantly fails. *Ib.*
34. ———: **Evidence of Similar Acts: Instruction: Intent.** Where the information charges the false pretense to be that defendant gave in payment for mules a check on a bank in which he had no funds, it is proper to permit the State to prove that other checks drawn on the same bank, shortly before or shortly after the offense charged, were, to defendant's knowledge, refused payment for lack of funds, but in such case the jury should be instructed that proof of such other recent and similar crimes is admitted for the sole purpose of showing the intent of defendant in giving the check complained of. *Ib.*

CURATOR'S DEED. See Guardian and Curator.

DAMAGES.

Corporation: Liability for Malicious Assault by Agent Upon Patron. A corporation, an express company and a common carrier, which had delivered a consignment of fruit to plaintiff, who, after refusing on account of a shortage in the shipment to sign a receipt therefor until the company's agent would present his claim for an allowance for the shortage, returned at the agent's request, given by telephone, to defendant's office for the purpose of discussing a settlement of the matter, and when near the office was met by said agent, who demanded that plaintiff then and there sign said receipt, and when plaintiff under protest was in the act of signing it, suddenly drew a pistol and without warning shot plaintiff, is liable in civil damages, both actual and punitive, to plaintiff for the injuries resulting from said assault; and a second count in the petition in which knowledge by defendant of the agent's violent temper, quarrelsome disposition and unfitness for his position, in addition to such other facts, is charged, also states a cause of action.

Held, by WOODSON, C. J., dissenting with whom BLAIR, J., concurs, that the agent's act was a crime, personal to himself, in no way within the scope of his agency, and could not be authorized by the company, because unlawful, and being wholly unauthorized and unauthorizable, the company is not liable in civil damages for the injuries to plaintiff caused by his murderous assault. *Maniac v. Express Co.*, 633.

DEFINITIONS.

1. **Due Care: Negligence.** Due care is a care adjusting itself to the circumstances of the case, and negligence is the absence of that care. *Miller v. Railroad*, 19.
2. **Culpable Negligence.** An instruction defining "culpable negligence" as the failure to exercise "the highest degree of care which a very prudent and ordinarily skillful driver of an automobile would have used under the same or similar circumstances," and authorizing a conviction if the jury found that the death of the pedestrian at a street intersection resulted from the failure of defendant to exercise such "highest degree of care," is erroneous. *State v. Horner*, 109.
3. ———: **Definition in Civil Code.** The statute (Laws 1911, pp. 330-331) authorizing a recovery of damages in a civil action for a failure to exercise "the highest degree of care," has reference to civil actions only, and in no sense is to be considered a part of the criminal code. *Ib.*
4. ———: **Definition in Criminal Action.** Culpable negligence, as used in the statute (Sec. 4468, R. S. 1909) making the killing of a human being by the culpable negligence of another manslaughter in the fourth degree, is the omission to do something which a reasonable prudent and honest man would do,

DEFINITIONS—Continued.

or the doing of something which such a man would not do, under all the circumstances surrounding each particular case. *Ib.*

5. **The Word "Certify."** The word certify is not indispensable to a certificate. It means to give certain knowledge or information, or to testify with certainty in writing. *State ex inf. v. Jones*, 191.
6. **Corporation: Incorporation Tax: Distinction Between Capital and Capital Stock.** In determining the amount of money which a corporation must pay to the Secretary of State for its certificate of incorporation, it is not material to accurately define, and distinguish the difference in meaning of, "capital" and "capital stock." The amount of money required by law to be paid into the corporation's treasury in money or money's worth for the prosecution of its business when organized, may not improperly be termed its capital stock, but it also constitutes its assets or capital, because it is its actual and only property. *State ex rel. v. Roach*, 435.

DEPOSITARY OF INSURANCE SECURITIES. See *Insurance*.

DEPOSITARY OF SECURITIES. See *Trust Companies*.

DOCKET. See *Courts*.

DRAINAGE DISTRICT.

1. **Title to Act: Broad Enough to Include Amendment.** The title to the Act of 1879, being "An Act to provide for the formation of drainage districts, to reclaim and drain swamp and overflowed lands in this State," was broad enough to include provision for any work, whether drain or levee, effectual for the purposes of reclamation; and in consequence, any subsequent amendment by mere reference to that act by section, article and chapter, as it later appeared in the Revised Statutes, fell within the title, so long as it related to the general purposes of reclamation; and all subsequent amendments have related thereto, and have been germane to the subject-matter of that act. In re *Birmingham Drainage District*, 60.
2. **So Named in Act: Include Levees.** The fact that the Act of 1879 and subsequent amendments thereto have designated districts organized thereunder as "drainage districts" does not limit the activities of such districts to digging ditches, nor shear them of the power expressly given to construct levees. *Ib.*
3. **Power to Construct Levees.** The Act of 1879 contemplated the construction of levees by drainage districts, and the Act of March 24, 1913, Laws 1913, p. 232, which by the processes of amendment has grown out of the Act of 1879, expressly provides for the construction of levees by such districts. *Ib.*
4. **———: Exclusive Methods.** The Act of April 7, 1913 (Laws 1913, p. 290), does not provide an exclusive method for the organization of districts when the construction of levees is contemplated. *Ib.*

DRAINAGE DISTRICTS—Continued.

5. **Levees and Drains: Two Similar Statutes.** The fact that the Legislature by progressive amendments has brought the Act of 1879 (now Act of March 24, 1913, Laws 1913, p. 232) and the Act of 1887 (now Act of April 7, 1913, Laws 1913, p. 290) into almost exact harmony as to the character of lands which may be included in a district, the persons who may move for its incorporation and the methods to be employed in working out its destiny, does not destroy any part of the Act of March 24, 1913, or limit the powers by it explicitly conferred upon a district organized under it. A district may be organized under that act for the purpose of reclaiming overflow land by the construction of a levee. In re Birmingham Drainage District, 60.
6. **Delegation of Legislative Power to Engineer.** That part of section 10 of the Act of March 24, 1913 (Laws 1913, p. 232), which provides that the plan of reclamation, as reported by the engineer, or modifications thereof as approved by him after consultation, shall be adopted by the board of supervisors, is not unconstitutional as a delegation of legislative power to the engineer. In the nature of things there must be a plan, and some one must be empowered to adopt a plan, and manifestly the Legislature cannot provide detailed plans of reclamation in such general acts. *Ib.*
7. ———: **When Raised.** Besides, the objection that said part of the act is unconstitutional on the ground that it is a delegation of legislative power to the engineer, not being one that goes to the whole act, does not fall within the scope of the objections which the statute prescribes may be made to the incorporation of the district. *Ib.*
8. ———: ———: **At the Hearing.** Moreover, that objection should be made at the hearing. *Ib.*
9. **Non-Resident Supervisors.** And an objection that the provision of section 5 of the act, authorizing the selection of supervisors who do not reside in the district or county in which the district is situate, violates the principle that "jurors must be of the vicinage," is not an objection that the statute prescribes may be made to the incorporation of the district, and is one that should be made at the hearing if it is to be urged on appeal. Besides, supervisors are not jurors, and the objection is untenable. *Ib.*
10. **Voting By Acres: No Representation by Owners of Personalty.** That part of section 5 of the act which provides that in electing the first supervisors each "acre of land in the district shall represent one share, and each owner shall be entitled to one vote in person or by proxy for every acre of land owned by him in such district" is not unconstitutional, on the theory that it disfranchises those who own less than one acre and those owning personalty only. The exclusion from voting of those who own personalty only is not objectionable, since personalty is not in any wise affected by the act; and since it states each acre shall represent one share, it follows that each fraction of an acre represents a corresponding fractional portion of a share, and its owner is authorized to vote accordingly. *Ib.*

DRAINAGE DISTRICTS—Continued.

11. **Excessive Indebtedness: Special Taxes.** An objection that the large sums necessary to construct the contemplated improvement will create an indebtedness in the form of taxes in excess of and contrary to the constitutional limitation upon taxation, will not avail to defeat the incorporation of a drainage district. The costs of the improvement are benefits assessed against the property, and such assessments are not public taxes. *Ib.*
12. **Sections Applicable to Former Organization.** Section 60 of the Act of March 24, 1913, Laws 1913, p. 232, applies to districts organized prior to April 8, 1906, and objections thereto are not available to proceedings begun under said act. *Ib.*
13. **Inclusion of Railroad.** The Act of March 24, 1913, Laws 1913, p. 232, authorizes the inclusion of a railroad as a part of the drainage district. It is not excluded by section 39, which provides that the word "owner" as used in the act shall not include reversioners, remaindermen, trustees or mortgagees, "who shall not be counted and need not be notified by publication, or served by process, but shall be represented by the present owners of the freehold estate in any proceedings under this act," for that section does not exclude any one, whether the owner of a freehold or an easement in land. *Ib.*
14. **———: Entire Line of Road.** The fact that the railroad company's line will be left exposed to overflow for many miles along the river front at points not included in the district, does not authorize the exclusion of its entire line. *Ib.*
15. **Inclusion of Lands not Benefited.** The extent to which a tract of land will be benefited does not go to the question of the propriety of including it in the drainage district, but rather to the amount of benefits to be assessed against it. Evidence showing that about one-fourth of the land included is in need of drainage at all times, that about one-tenth of it overflows only in times of very high water, that the remainder has overflowed frequently in the last score of years, and that a portion of appellant's railroad track has overflowed at times in recent years, will authorize a decree incorporating a drainage district, and the inclusion of appellant's track. *Ib.*
16. **Unjustified Reclamation: When Objection Must Be Made.** The objection that the work of reclamation will be so costly that it will not be justified by the benefits which may accrue, should be made when the plan of reclamation has been adopted and the cost and benefits estimated. If it proves true that the costs will not be justified by the benefits, the court must dissolve the incorporation. *Ib.*
17. **Other Property: Means Real Estate.** The words "other property" used frequently in the act of March 24, 1913, authorizing the organization of drainage districts, do not mean personal property, but land and all interests in real estate. *Ib.*
18. **Ownership of Land: Testimony.** An objection to the testimony of a witness, made after he had, in answer to a question, testified that he knew of his own knowledge that the

DRAINAGE DISTRICTS—Continued.

several signers of the articles of association for the drainage district owned in the district the respective number of acres set opposite their names, came too late. In re Birmingham Drainage District, 60.

19. ———: Testified by Tenant. It is competent for a tenant to testify as to the persons under whom he holds possession of tracts of land included in the drainage district. *Ib.*

DRAMSHOPS.

1. License: Granted During Term at Which Petition is Filed. Section 7201, Revised Statutes 1909, declaring that the petition for a dramshop license "shall be filed in the office of the Clerk of the County Court not less than ten days before the first day of the court to which it is to be presented and remain on file for public inspection and by said clerk laid before the court at the first term thereafter, and all dramshop licenses issued contrary to the provisions of this section shall be void," does not render invalid a dramshop license granted at the same term at which the petition was filed. The language requiring the clerk to lay the petition before the court at the first term thereafter simply imposed on him a ministerial duty for the benefit of the applicant, and was never intended to invalidate a license granted by the court in due form at the same term; and especially should such license not be held void for the reason it was granted at the same term the petition was filed, where the applicant with his attorney and the remonstrators were in court at the appointed time, and the application was heard on its merits. [Following *State v. Evans*, 83 Mo. 319; and disapproving *State ex rel. v. Wiethaupt*, 165 Mo. App. 634.]

Held, by WOODSON, J., dissenting, that the statute is not directory simply, but mandatory, nor was it intended for the benefit of the applicant, but was intended to give to the inhabitants of the county an opportunity to be heard and to remonstrate; and the clause declaring that "all dramshop licenses issued contrary to the provisions of this section shall be void" did not have reference only to the filing of the petition, but clearly makes void a license granted at the same term the petition is filed. *State ex rel. v. Wiethaupt*, 306.

2. ———: ———: Inspection of Petition. But a dramshop license cannot be granted or the petition therefor heard until ten days after the petition has been filed with the County Clerk. That part of the statute (Sec. 7201, R. S. 1909) is mandatory, and was enacted in order that citizens of the county might have ample opportunity for inspection of the petition, and to file a remonstrance, etc. *Ib.*

EJECTMENT.

1. Identity of Names. From identity of name prima-facie identity of person is to be presumed; but this prima-facie case of identity is liable to be shaken by the slightest proof of facts which produce a doubt of identity. *Keyes v. Munroe*, 114.

EJECTMENT—Continued.

2. ———: **Reyes for Keyes: Deed Contradicted by Index.** If the only proof to contradict the record of a deed made in 1859 showing E. N. Reyes to be the grantee is the record index showing E. N. Keyes to be the grantee, a judgment in ejectment for the heirs of E. N. Keyes cannot stand. The deed in such case would be the best evidence. But proof *aliunde* may be made that the deed was erroneously recorded, or that the name upon the record is Keyes and not Reyes, and that the apparent discrepancy arises from the age in the record or from blind writing; and if such proof of a substantial character is made, then the index is competent as a circumstance. *Ib.*
3. **Parties: Deceased Devisees: Judgment for Whole.** Where plaintiffs claim title through a will which devised one-third of the land in fee to his widow, who has died since the suit began, a judgment which gives the whole of the land to the descendants of testator's deceased son and only other devisee, is erroneous, unless there is a showing that said son was the only child of said widow and that she died the owner of said one-third and intestate as to him, or if testate that she devised the land to him or his descendants. *Ib.*

ELECTIONS. See Local Option Election.**EMINENT DOMAIN.**

1. **Appellate Jurisdiction: Title to Real Estate: Condemnation: Easement.** A suit by a city to condemn private land for sewer purposes involves title to real estate. Even though a cursory view may suggest that only the easement and not the fee is affected, yet it remains true, that, though the fee remain in the owner, his right to the use and exclusive possession of the land is either lessened or taken away, and as a consequence the title is affected to the extent of the injury. *Moberly v. Lotter, 457.*
2. ———: **Record Proper: Admission in Abstract.** An admission by plaintiffs in error in a condemnation case that the petition contains a detailed description of the lands owned by them and of the parts to be taken, and asserting that for that reason the description is not set out, authorizes a holding that the lands to be taken are described with sufficient certainty. *Ib.*
3. **Condemnation: Taking of Fee.** Statutes authorizing the fee of land taken for a public sewer to be vested by the judgment in the city, violate no constitutional provision. *Ib.*
4. ———: **Leasehold: Measure of Damages: Loss of Business: Expense of Removal: Depreciation in Value of Goods.** In the condemnation of land for a public use neither the lessee nor the owner is entitled to be compensated, as for damages, for the cost of the removal of a stock of goods from the land taken to another place and their installation there, nor for a depreciation in the value of the goods caused by their removal and reinstallation, nor for the loss of profits caused by an interruption of the business during the period of removal and its reestablishment. Such damages are so vari-

EMINENT DOMAIN—Continued.

ant as to fall within the classification of speculative. *St. Louis v. Railroad*, 694.

5. ———: ———: ———: **Fixtures.** In the condemnation of land the value of permanent fixtures, being such as may be considered a part of the real estate, is to be estimated as an element of damage; and the owner or lessee is entitled to be compensated for such trade fixtures as are contained in and affixed to the premises condemned. And under the apparent status of this case it is ruled that if the condemnor does not want such trade fixtures and the owner of the premises or the lessee elects to take them, the owner of the fixtures is entitled to be recouped in damages to the extent of their reasonable market value, as they stand, when confronted by the necessity of immediately tearing them out and reestablishing them elsewhere. *Ib.*

ESTOPPEL.

1. **Conveyance: Wrongful Delivery: Unauthorized Opening of Letter.** The owner of land resided in Cincinnati, and his agent and brother resided in Missouri and was sick at the house of a friend and while there some kind of a trade was made for the land. The agent wrote the owner to make out a deed for the land, naming his host's son as grantee, inclose it in an envelope addressed to the agent, and inclose that envelope in another addressed to the agent's host. That was done, and when the letter was received by the host he opened both envelopes and immediately placed the deed of record without the knowledge or consent of either the agent or owner. *Held*, that the possession and record of the deed was wrongful, but that does not determine the rights of a subsequent innocent purchaser for value, even though the deed itself has been cancelled for non-delivery. *Leonard v. Shale*, 123.
2. ———: ———: **Good Faith of Subsequent Purchaser.** A purchaser for a valuable consideration from the apparent record owner in possession of the land, with no knowledge that the deed to the apparent owner had been wrongfully obtained by him and placed of record without the owner's knowledge or consent, and with no such knowledge as would put him on inquiry, is not chargeable with bad faith. Nor does the fact that he had heard, before he made a loan on the land, that such apparent record owner had gotten a farm at a bargain, impugn his good faith in making the loan. *Ib.*
3. ———: ———: **Depository: Violated Confidence: Innocent Third Parties.** No title passes to the grantee who wrongfully obtains or steals a fully executed deed and places it of record; but the grantor, as to subsequent grantees, may be estopped to dispute the validity of a conveyance by said grantee, by the conduct of the grantor in placing a fully executed deed in the hands of the father of such grantee, as his depository, or by the conduct of the grantor after he knew such deed had been delivered and placed of record. So that where the owner's agent, residing at the residence of the grantee's father, wrote the owner to make out a fully executed deed, in-

ESTOPPEL—Continued.

close it in an envelope addressed to the agent and inclose that in another envelope addressed to the father, and that was done, and when the letter came both envelopes were opened by the father and the deed immediately placed of record without the knowledge or consent of the grantor or his agent, and the agent learned the facts soon after the deed was placed of record and the grantee and father went into possession and while in possession borrowed \$1500 from defendant, who knew nothing of the fraudulent facts, and secured the loan by a deed of trust on the land, and the plaintiff (the original grantor) knew for six months before defendant made the loan and obtained the deed of trust that the undelivered deed had been recorded, the plaintiff is estopped to dispute the validity of the deed of trust, because (1) he is chargeable with the knowledge of his agent who was in charge of the land at the time the deed was obtained, and (2) because he made the grantee's father the depository of the deed and if he violated his confidence innocent third parties should not suffer, and (3) because he did not take prompt action, after he knew the deed had been recorded, to divest the grantee of his apparent record of title. *Ib.*

4. ———: ———: Prompt Action. The real owner of land cannot knowingly permit the title to stand upon the record in the name of another, and then defeat a mortgage placed thereon by such apparent owner, if the mortgagee acts in good faith and without knowledge of the true facts in taking the lien. A delay of six months by the grantor after he discovers that his fully executed deed had surreptitiously and wrongfully, without actual delivery, been placed of record, to bring proper proceedings to have the title divested out of the grantee, will estop him from enforcing his title as against a mortgagee who, without any knowledge of the fraud, in good faith in the meantime loans money to the apparent record owner. *Ib.*

EVIDENCE.

1. Of Impotency. Testimony that the punitive father of the illegitimate child had mumps before he knew the child's mother, which he said rendered him impotent through life, and that his scrotum after his death was gone, is evidence tending to establish his impotency. *Drake v. Hospital Assn., 1.*
2. Recognition of Bastard Child: Presumption. The marriage, after emancipation, of a man to a woman who while she was a slave gave birth to an illegitimate child, and the subsequent recognition of such child by him as his own, there being evidence that they lived in the same community and none that he did not have opportunity to become the father of such child, although at the time of its birth another woman was his slave wife, raises the presumption that he was the child's father; and if that presumption is not overcome by evidence showing him to have been impotent or otherwise incapacitated to become a father at and prior to the child's birth, such child is to be held legitimate, the same as one born in lawful wedlock. *Ib.*
3. Drainage District: Other Property: Means Real Estate. The words "other property" used frequently in the act of

EVIDENCE—Continued.

March 24, 1913, authorizing the organization of drainage districts, do not mean personal property, but land and all interests in real estate. In re Birmingham Dr. Dist., 60.

4. ———: **Ownership of Land: Testimony.** An objection to the testimony of a witness, made after he had, in answer to a question, testified that he knew of his own knowledge that the several signers of the articles of association for the drainage district owned in the district the respective number of acres set opposite their names, came too late. *Ib.*
5. ———: ———: **Testified By Tenant.** It is competent for a tenant to testify as to the persons under whom he holds possession of tracts of land included in the drainage district. *Ib.*
6. **Homicide: Corroboration of Irrelevant Statements.** Copies of a periodical and catalogue found among deceased's effects, the one advocating free love and the other containing a price list of articles designed to prevent conception, are not admissible for the purpose of corroborating defendant's testimony that she believed deceased had taken away her unmarried sister-in-law for immoral purposes, or of elucidating the state of her mind at the time she shot deceased. *State v. Carion*, 82.
7. **Confession: Law of Case.** A ruling upon a former appeal that a written confession obtained by the police captain and other officers from defendant was as a matter of law not voluntary and therefore inadmissible, becomes the law of the case on a second trial, unless a different state of facts is shown. *State v. Powell*, 100.
8. ———: **Swearing Away Legal Defects.** Legal defects which arose from the State's affirmative proof and which as a matter of law destroyed the voluntary character of defendant's alleged confession on the former trial, cannot be sworn away by the same witnesses upon the second trial without a commission of perjury. If the facts pertaining to the voluntary character of the confession were fully developed at the first trial, a holding that, upon the State's own showing, the confession was not voluntary and therefore inadmissible, became the law of the case on a second trial. *Ib.*
9. ———: **Other Oral Confessions.** But the inadmissibility of that written confession, obtained by policemen after continually "sweating" defendant for eleven hours, does not affect the admissibility of a prior oral confession made to a special officer which was not involved in the former ruling. *Ib.*
10. ———: **Guilt Dependent Upon.** Considerations of justice demand that great caution should be used and great exactness required in determining the admissibility of a confession by defendant where without that confession there is no substantial evidence of his guilt; and especially should that caution be observed where the confession contains a statement of fact which is conclusively shown to be false. *Ib.*
11. **Manslaughter: By Automobile Driver: Sufficient Evidence.** Testimony that defendant was driving his automobile at a

EVIDENCE—Continued.

speed of fifteen to twenty miles an hour, at an intersection of two streets; that the view between him and the deceased pedestrian was unobstructed; that when deceased was ten or fifteen feet out in the street, after having left the sidewalk at the street intersection, and was walking in a straight direction, he was struck by the automobile and dragged twenty-five feet or more; that no warning or signal was heard; that deceased was apparently oblivious of the approach of the automobile until it was upon him; that going six miles an hour, as defendant testified, it could have been stopped in three or four feet, and that when defendant first saw deceased he was within three feet of him, and instead of stopping his car he swerved it in an effort to avoid hitting him, is sufficient evidence to support a verdict of manslaughter in the fourth degree based upon culpable negligence. *State v. Horner*, 109.

12. **Unprobated Will: No Objection.** An unprobated will is not competent evidence of title; but if it is offered and admitted without objection, and there are facts in the record which amount to more than an inference that it had been probated, the trial court will not on appeal be convicted of error in admitting it. *Keyes v. Munroe*, 114.
13. **Ejectment: Identity of Names.** From identity of name prima-facie identity of person is to be presumed; but this prima-facie case of identity is liable to be shaken by the slightest proof of facts which produce a doubt of identity. *Ib.*
14. ———: ———: **Reyes for Keyes: Deed Contradicted by Index.** If the only proof to contradict the record of a deed made in 1859 showing E. N. Reyes to be the grantee is the record index showing E. N. Keyes to be the grantee, a judgment in ejectment for the heirs of E. N. Keyes cannot stand. The deed in such case would be the best evidence. But proof *aliunde* may be made that the deed was erroneously recorded, or that the name upon the record is Keyes and not Reyes, and that the apparent discrepancy arises from the age in the record or from blind writing; and if such proof of a substantial character is made, then the index is competent as a circumstance. *Ib.*
15. **Witness: Competency: Tort: Death of Tortfeasor.** Section 6354, Revised Statutes 1909, declaring that where one of the original parties to a cause of action in issue and on trial is dead, the other party to such cause of action shall not be admitted to testify, applies to actions *ex delicto*; and, therefore, where plaintiff sues a railroad company to recover damages on account of personal injuries claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment, and thereby created the cause of action, and said agent is dead at the time of the trial, the plaintiff is not permitted under the statute to detail in evidence his version of the controversy and the assault made upon him. [Approving *Leavea v. Southern Railroad Co.*, 171 Mo. App. 24, and disapproving *Drew v. Wabash Ry. Co.*, 129 Mo. App. 459.] *Leavea v. Railroad*, 151.

EVIDENCE—Continued.

16. **Of Collateral Crime.** Evidence of a collateral crime which has a logical connection with the crime directly involved and is so linked with it as to constitute it a part of the continuous accomplishment of a fixed and common design, is admissible. So that where defendant is charged with the abominable crime against nature and the evidence shows that, while prosecutrix and a man were seated in a park near midnight they were accosted by defendant and two accomplices, who falsely represented themselves as private detectives, and while the accomplices, under the guise of an arrest, took the man to one end of the park, the defendant forcibly took her to another part and there ravished her and after forcibly detaining her for sometime inserted his sexual organ in her mouth, evidence that, after the accomplices had returned and they had outraged her in the same way, the three took her to the rear of an abandoned saloon, an hour and a half or two hours after they had first accosted her in the park, and there again assaulted her in the same way, was admissible, to establish a conspiracy and to prove that all that was done was but a part of a fixed, single and common design. *State v. Katz*, 493.
17. ———: **Motion to Elect.** Nor was it error on the part of the trial court to refuse to compel the State, after the evidence of the second assault was in, to elect upon which assault it would go to the jury. *Ib.*
18. **Incredible.** Although the facts of a case reveal such a state of degradation and indecency as to challenge credulity, they will not be held to be incredible and opposed to human experience, if prosecutrix's testimony is corroborated and the punishment imposed by the verdict is so moderate as to relieve the jury of every imputation of passion and prejudice; for legislative enactments against crimes against nature and the transcripts of courts attest the fact that such crimes are within human experience. *Ib.*
19. **Testimony: Expert: Insanity: Cause.** Where the issue is whether plaintiff's insanity was congenital or was caused by a fall of the stone-carrying hoist on which he was riding, it is error to permit a medical expert, who did not see the fall nor examine plaintiff for nearly a year afterwards, to testify that "a blow of that character could have caused insanity." He cannot substitute his conclusions for the conclusions to be found by the jury. He cannot say that a conceded condition is the result of the proven injury, where the producing cause thereof is the whole issue. *Deiner v. Sutermeister*, 505.
20. **Circumstance.** In a suit by an administrator against decedent's wife to recover bonds, which she claims as her own, testimony by an attorney that at a time certain decedent brought his wife to his office and stated the circumstance of a loss of bonds belonging to his wife and not in suit, is admissible as tending to show that at that time she owned and possessed bonds, and as a circumstance from which an inference may be drawn throwing some light upon the purpose for which both held a joint interest in the safety deposit box in which the bonds in suit were kept. *Carmody, Admr., v. Carmody*, 556.
21. ———: **Answers to Interrogatories: As Pleadings and Evidence.** In a suit by an administrator to recover bonds in the

EVIDENCE—Continued.

possession of decedent's wife claimed by her as the owner, the written interrogatories propounded to her for answer and and her written answers thereto are to be considered merely as pleadings in the case, and the statements contained in said answers cannot take the place of testimony, but testimony should be offered upon the trial as in any other case. *Ib.*

22. ———: ———: ———: **Waiver.** Nor does the filing of interrogatories in such a case constitute a waiver of the incompetency of the wife to testify to transactions between her and her deceased husband involving the cause of action and at issue. *Ib.*

23. **Admission: Undenied Statement of Another.** A defendant cannot be charged with an undenied damaging voluntary statement made by a party out of his presence, when to deny it would require him to shout his denial up a stairway to a woman in the employ of his co-defendant.

Held, by WALKER, J., dissenting, that visual and immediate physical presence is not necessary to authorize the application of the rule which renders testimony in regard to a damaging statement competent, and construes silence, under a proper condition, to be an admission of the truth of such statement; hearing and understanding, and not mere proximity, are the tests of the admissibility of such testimony. *State ex rel. v. Ellison*, 604.

24. ———: ———: **Silence: Impertinence: Personal Security.** A failure by a defendant to reply to a damaging statement cannot be held to be an admission of its truth and is not admissible in evidence: first, if made under such circumstances as affords him no opportunity to reply, for instance, if the denial must be shouted up a stairway; second, if it is a voluntary statement made by the office girl or other mere employee of a co-defendant, who may have adverse interests, and therefore not demanding a denial; third, if voluntarily made by a stranger (that is, a person not a party to the action) and, therefore, an impertinence; and, fourth, if made under such circumstances that the defendant, as a matter of personal security, has a right to ignore it.

Held, by WALKER, J., dissenting, that, where two physicians had offices on different floors of the same building and the one below had treated the patient of the other, and when the officer came to serve the summons on them in the action for civil damages by the patient, the one below called up the stairs to the office girl of the other, to know if she had a record in the case, and she replied that she had and that the patient was the school teacher into whose eye he had dropped iodine and put it out, the answer was not a voluntary statement, nor an impertinence, but made by one whose authority to give it was recognized by the physician, and should have been admitted as evidence of his acquiescence therein. *Ib.*

25. ———: **Probative Force.** A failure to deny or to reply to a voluntary statement made by a stranger to the action to a defendant, is the weakest of all evidence in probative force, and is not admissible as an admission of its truth except when made under such circumstances as point clearly to the necessity for a reply. *Ib.*

EVIDENCE—Continued.

26. **Felonious Assault: Proof.** An assault may be charged to have been committed by different means, and proof of any will sustain the charge. *State v. Webb*, 672.
27. ———: **Evidence of Provocation.** The court did not err in withdrawing from the jury's consideration testimony to the effect that the prosecuting witness, a school teacher, some hours before the assault with fists, had chastised defendant's son. That chastisement was neither a defense to nor in mitigation of the charge of felonious assault under Sec. 4483, R. S. 1909, where the wounding and maiming did not result in death. *Ib.*
28. **False Pretense: Evidence of Similar Acts: Instruction: Intent.** Where the information charges the false pretense to be that defendant gave in payment for mules a check on a bank in which he had no funds, it is proper to permit the State to prove that other checks drawn on the same bank, shortly before or shortly after the offense charged, were, to defendant's knowledge, refused payment for lack of funds, but in such case the jury should be instructed that proof of such other recent and similar crimes is admitted for the sole purpose of showing the intent of defendant in giving the check complained of. *State v. Young*, 723.

EXCEPTIONS.

1. **Motion to Dismiss Sustained: Where No Ground is Assigned: Evidence.** Where the motion to dismiss assigns several grounds, one of which is to the effect that the petition shows on its face that the action is barred, and others which call for evidence to establish them, and the motion is sustained without any assignment of the ground therefor, then on appeal by plaintiff he cannot rely solely upon the disclosures of the record proper, because, as long as the motion went both to the record proper and matters of exception, the appellate court will indulge the presumption that the trial court decided correctly, if not upon the disclosures of the record proper, then upon the matters of exception alleged in the motion, there being no motion for a new trial and hence no evidence preserved for review. But where the trial court sustains the motion on the specific ground that the record shows on its face that the action is barred, then that point is for consideration in the appellate court, without any motion for a new trial. *State ex rel. v. Ellison*, 423.
2. **Appellate Practice: Writ of Error: No Bill of Exceptions.** If there is no bill of exceptions or motion for new trial, a writ of error preserves only the record proper for review. *Moberly v. Lotter*, 457.
3. ———: **Record Proper: Admission in Abstract.** An admission by plaintiffs in error in a condemnation case that the petition contains a 'detailed description of the lands owned by them and of the parts to be taken, and asserting that for that reason the description is not set out, authorizes a holding that the lands to be taken are described with sufficient certainty. *Ib.*
4. **Public Service Commission: Appeal: Matters Reviewable: No Evidence.** In the absence from the record of the evidence adduced before the circuit court there can, on appeal, be no review of its rulings: (a) where the circuit court, upon *certiorari*, had affirmed the action of the Public Service Commis-

EXCEPTIONS—Continued.

sion and approved its admission of evidence; or (b) where the circuit court had reversed and remanded the case to the commission for errors in refusing to admit relevant and competent evidence; or (c) where, upon the facts adduced in evidence, the finding of the commission was erroneous as a matter of right and equity and good conscience. *Macon v. Public Service Comm.*, 484.

5. ———: ———: ———: No Motion for New Trial: No Bill of Exceptions. The statute makes the appellate procedure pertaining to appeals in civil cases applicable to appeals from the rulings of the circuit court affirming, upon *certiorari*, the action of the Public Service Commission; and unless the evidence before the circuit court is preserved in a bill of exceptions, and kept alive by a motion for a new trial, there is nothing for review on appeal to the Supreme Court except the bare record of the proceedings in the circuit court. Even though the case be denominated one in equity, there can be no review of the evidence, unless there is both a motion for a new trial and a bill of exceptions. *Ib.*

EXECUTION.

1. Judgment of Probate Court: Collateral Attack: Sale of Property to Pay Special Legacy. Where a legacy was given to a named legatee, there was money in the hands of the executor sufficient to pay it after all debts and other legacies as shown by the annual settlement had been paid, and more than two years had elapsed since letters testamentary had been granted, it will not be held, in the absence of any contrary showing by the record, that the probate court was without jurisdiction to make an order directing the legacy to be paid and to award execution thereon against the executor; and a sale of the executor's land by the sheriff in pursuance thereof, will not be held invalid on the ground that the probate court was without jurisdiction. *Harter v. Petty*, 296.
2. Belated Notice of Administration: Payment of Legacy. The fact that the executor delayed for nearly two years after letters testamentary were issued to him the publication of notice of administration will not avail him in an attempt to defeat the sale of his land under execution, in pursuance to an order of court to pay a legacy, made more than two years after the letters were issued, but less than two years after notice was given. He cannot invoke his violation of the statute requiring him to give notice within thirty days, as a ground for defeating either the order or execution. *Ib.*

EXECUTORS AND ADMINISTRATORS. See Administration.

FALSE PRETENSE.

1. Information. An information which plainly alleges (1) what the pretenses were, (2) to whom they were made, (3) that he to whom they were made relied upon them and, acting upon such reliance, was induced to and did part with his property, (4) that by means of such pretenses said property was obtained, (5) that the property so obtained was owned by the person named, (6) that its value was a named sum, (7) that said pretenses were made by defendant designedly and feloniously with intent to cheat and defraud, and (8) that said pretenses

FALSE PRETENSE—Continued.

were false and that defendant knew they were false when he made them, states the component elements of the offense denounced by Sec. 4565, R. S. 1909, as amended by Laws 1911, and is sufficient. *State v. Young*, 723.

2. ———: **Misjoinder of Offenses: Different Statutes: Tests: Bar.** The legal test of permitted joinder of offenses is not whether the offenses charged in different counts of a single information as having been committed in different ways are, or are not, defined and denounced by different sections of the criminal code, but whether such offenses arose out of the same transaction, and are so far cognate that an acquittal or a conviction of the one would be a bar to a trial for the other. *Ib.*
3. **Instruction: Under Abandoned Count.** An instruction in a prosecution for obtaining property by false pretense may be good under Sec. 4765, R. S. 1909 (as amended in 1913), but not good under Sec. 4565, R. S. 1909 (as amended in 1911); and if the information contains two counts, one charging a crime under section 4565, and the other, a crime under section 4765, and the latter count is abandoned, an instruction bottomed on section 4765 and possibly good when tested by it, is bad if it does not meet the requirements of section 4565. *Ib.*
4. ———: **Deception.** Instructions, in a prosecution for the false pretense denounced by Sec. 4565, R. S. 1909 (as amended in 1911), must require that the person alleged to have been defrauded was deceived by the false pretenses made by defendant; and if they do not contain such a requirement, a conviction under that statute cannot stand. *Ib.*
5. **Deceptions: Knowledge of Falsity.** If the person alleged to have been defrauded knew at the time that defendant's pretenses were false, no crime was committed under section 4565, Revised Statutes 1909. *Ib.*
6. **Promise to Pay: Bank Check.** If at the time defendant offered his check on a certain bank in payment for the mules, the seller was informed that defendant had no funds in that bank, but defendant promised that by the time the check reached the bank the money to pay it would be there, and the check was accepted under such circumstances, no conviction under section 4565 can stand; for the effect of an agreement to have the money in the bank to pay the check on a future day, was to make of the alleged pretense but a mere promise, and so remove it from the category of crimes. *Ib.*
7. ———: **Made in Good Faith.** Nor need the promise to pay at a future date be made in good faith; for the moment the alleged false pretenses are shown to be naked future promises, the prosecution under section 4565 inevitably and instantly fails. *Ib.*
8. **Evidence of Similar Acts: Instruction: Intent.** Where the information charges the false pretense to be that defendant gave in payment for mules a check on a bank in which he had no funds, it is proper to permit the State to prove that other checks drawn on the same bank, shortly before or shortly after the offense charged, were, to defendant's knowledge, refused payment for lack of funds, but in such case the jury should be instructed that proof of such other recent and similar crimes is admitted for the sole purpose of showing the intent of defendant in giving the check complained of. *Ib.*

FEDERAL EMPLOYERS' LIABILITY ACT. See Negligence, 7 to 17.

FEEs FOR INCORPORATING COMPANY. See Corporations.

FELONIOUS ASSAULT. See Maiming and Wounding.

FIRE LIMITS.

1. **Definition of Structures.** Within properly defined limits a municipal legislative body may define the objects designed to be affected by its fire-limit ordinances and a court in construing such ordinances is ordinarily bound to follow the city's definitions of buildings and other structures so affected. *St. Louis v. Nash*, 523.
2. **Tent Lacking Portability: Building.** A structure lacking the element of portability, and being canvas stretched and held in place by a wire cable attached to two large telegraph poles set firmly in the ground and by guy cables run laterally from this main cable to other posts also set firmly in the ground, with a stage, dressing rooms, ticket office and benches built of wood, the whole used as a moving-picture theatre, is not a tent, as that word is ordinarily understood; but under the ordinances of St. Louis declaring that the word "building" shall be taken to mean "any structure for the support, shelter or enclosure of persons, animals or chattels" is a building within the purpose and intent of the fire-limit restrictions. *Ib.*
3. **Reasonable Regulation.** And an ordinance which prevents the carrying on of a permanent business in such a building is a reasonable police regulation. *Ib.*

FORMER ACQUITTAL. See Jeopardy.

FORMER ADJUDICATION. See Res Adjudicata.

FURNITURE FOR STATE CAPITOL. See Capitol.

GUARDIAN AND CURATOR.

1. **Guardian's Sale: For Less Than Three-Fourths of Appraised Value.** A private sale of real estate for less than three-fourths of its appraised value, whether by a guardian or administrator, is void, although approved by the probate court, for the court in such case has no jurisdiction to approve it. [Following *Carter v. Culbertson*, 100 Mo. 269, and overruling *Smith v. Black*, 231 Mo. 681.] *Miller v. Staggs*, 449.
2. **Minor: Sale of Land: By Curator Appointed Without Notice: Constitutional Right.** When the Legislature as *parens patriae* takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for his education and support, it does not deny to him the equal protection of the laws, but gives him the protection of laws especially designed for his protection; it does not take from him his property, but uses it for his benefit. And the sale of a non-resident minor's land by a curator who was appointed by the probate court without notice to the minor of the application for such appointment, if otherwise done in harmony with the statute, which in 1879 did not require such notice, did not violate the provision of the Federal Constitution guaranteeing to him the equal protection of the laws, or the provision of the State Constitution declar-

GUARDIAN AND CURATOR—Continued.

- ing his property shall not be taken without due process of law. *Whittelsey v. Conniff*, 567.
3. **Non-resident Minor: Over Fourteen Years: Choosing Curator.** The General Statutes of 1865 did not give to a non-resident minor having real estate in this State, either under or over fourteen years of age, the right to choose his curator, or to have notice of the application for the appointment of a curator. *Ib.*
 4. ———: **Interloper.** A person who has been appointed curator of the estate of a non-resident minor at the suggestion and upon the application of another who holds a power of attorney from the minor's mother and adult sister for the sale of their interests in the same lands, and who sold those interests to the same persons who purchased from the curator, cannot properly be characterized as an interloper. *Ib.*
 5. ———: **Sale of Lands: Notice of Order of Sale.** The General Statutes of 1865 did not require that notice be given the minor of an application by the curator for an order of court to sell the lands of the minor. *Ib.*
 6. **Resignation: No Formal Discharge: Sale by Subsequent Appointee.** Where the resignation of a duly appointed curator has been accepted by the probate court by an order entered of record, the fact that he was not formally discharged will not affect a sale of the minor's land by a subsequent curator duly appointed. *Ib.*

HABEAS CORPUS.

1. **Courts: Legislative Jurisdiction.** As to a constitutionally recognized court, it is a general rule that the Legislature can neither add to nor subtract from the jurisdiction provided for it by the Constitution. And the enumeration in the Constitution of certain specific powers, with no hint of others to be added by law, is to be considered as an exclusion of all other powers. *State ex rel. v. Locker*, 384.
2. **Probate Courts: Power to Issue Habeas Corpus and Injunction Writs.** The Constitution enumerates the matters of which probate courts shall take cognizance, and neither a proceeding in *habeas corpus* nor a writ of injunction is among them, nor is either akin to the subjects named. The Constitution confers no power upon probate courts to issue writs of *habeas corpus* or injunction; and so much of section 2442, Revised Statutes 1909, as attempts by the use of the words "some court of record" to confer upon probate courts such power, is unconstitutional and void. *Ib.*
3. **What Courts May Issue.** The Supreme Court, courts of appeals, circuit courts and county courts (when aided by statute) have a constitutional warrant for issuing writs of *habeas corpus*, but the Constitution confers no such power on probate courts, nor does it authorize the Legislature to confer it. *Ib.*

HABITUAL CRIMINAL. See *Jeopardy*.

HOIST. See *Structure*, 1 and 2.

IDENTITY OF NAMES. See *Names*.

IMPOTENCY. See *Children*.

INDICTMENT AND INFORMATION.

1. **Pleading: Former Acquittal: Habitual Criminal.** Ordinarily the plea of *autrefois acquit* or *autrefois convict* should set out fully and accurately the former indictment, because the identity of the two offenses is the very gist of the plea, and because, before it is availing, the former conviction or acquittal must be had upon a valid indictment, and such identity and validity cannot otherwise be made to appear. But where the plea is directed to an indictment which alleges a former conviction and thereby seeks to charge defendant as an habitual criminal, it is not necessary to set out in the plea more than the indictment itself is required to contain, and to sustain the charge of being an habitual criminal it is required to allege only in general terms the conviction, date thereof, sentence, imprisonment and discharge upon compliance with the sentence. *State v. Collins*, 93.
2. ———: **Habitual Criminal: Former Acquittal: Plea of Former Jeopardy.** Where the indictment charges defendant with the crime of larceny and with having been convicted of a former larceny in 1909, a plea to the indictment to the effect that he is being twice put in jeopardy of the offense of being an habitual criminal, and should be discharged, for that he was in 1911 acquitted under an indictment charging he was an habitual criminal, is not sufficient, for the reason that it is not distinctly pleaded that he was acquitted of the crime then charged to him. If he was convicted of the crime itself, but was acquitted on the charge of having been formerly convicted, this fact should have been distinctly pleaded, and it is not. *Ib.*
3. **Felonious Assault: Wounding With Fists.** Under section 4483, Revised Statutes 1909, which is the maiming or wounding statute, it is not necessary to prove malice or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. The wounding and maiming may be done with the fists, and to support the charge it is not necessary to establish that the wounds were of a dangerous character, or such as are likely to produce death.
Held, by FARIS, J., dissenting, with whom WOODSON, C. J., and GRAVES, J., concur, that it is essential that an information drawn under Sec. 4483, R. S. 1909, aver the circumstances themselves which, if death has ensued, would have made the offense manslaughter, and that not having been done it is unnecessary to rule whether said statute can be violated by an assault with fists, or by the fists aided adventitiously by a finger ring.
Held, also, that if it be true, as announced by the majority opinion, that it is not necessary to establish that the wounds inflicted were of a dangerous character or such as are likely to produce death, it logically follows that any wound is, under said statute, sufficient to constitute felonious assault, and thereby the boundary line between common and felonious assault has been wiped out.
Held, also that said section 4483 denounces but two crimes: 1, The endangering of the life of another; and 2, The infliction of great bodily harm, either by (a) wounding, (b) maiming, or (c) disfiguring. *State v. Webb*, 672.

INDICTMENT AND INFORMATION—Continued.

4. ———: ———: Information. Under said statute it is not necessary to allege the particular means by which the wounding or maiming was done, since this may be accomplished by any means. *State v. Webb*, 672.
5. False Pretense. An information which plainly alleges (1) what the pretenses were, (2) to whom they were made, (3) that he to whom they were made relied upon them and, acting upon such reliance, was induced to and did part with his property, (4) that by means of such pretenses said property was obtained, (5) that the property so obtained was owned by the person named, (6) that its value was a named sum, (7) that said pretenses were made by defendant designedly and feloniously with intent to cheat and defraud, and (8) that said pretenses were false and that defendant knew they were false when he made them, states the component elements of the offense denounced by Sec. 4565, R. S. 1909, as amended by Laws 1911, and is sufficient. *State v. Young*, 723.
6. ———: Misjoinder of Offenses: Different Statutes: Tests: Bar. The legal test of permitted joinder of offenses is not whether the offenses charged in different counts of a single information as having been committed in different ways are, or are not, defined and denounced by different sections of the criminal code, but whether such offenses arose out of the same transaction, and are so far cognate that an acquittal or a conviction of the one would be a bar to a trial for the other. *Ib.*

INJUNCTION.

Vacating Alley: Right to Injunction: No Abutting Property.

The owners of land which lies only along the rear end of a public alley extending into a block, not being abutting owners, will, if the alley is vacated, sustain only such damages as are common to the public generally, and are not therefore entitled to a decree nullifying an ordinance vacating the alley. *Supply Co. v. Iron Works*, 138.

INSANITY.

1. Parties to Action: Insanity After Suit Brought. Even though the gist of the action is damages for insanity superinduced by negligent injuries, and the fact of insanity and the demand for damages therefor are brought into the case by an amended petition, plaintiff may maintain in his own name, without a guardian or next friend, a suit begun while he was sane. *Deiner v. Sutermeister*, 505.
2. Testimony: Expert: Cause. Where the issue is whether plaintiff's insanity was congenital or was caused by a fall of the stone-carrying hoist on which he was riding, it is error to permit a medical expert, who did not see the fall nor examine plaintiff for nearly a year afterwards, to testify that "a blow of that character could have caused insanity." He cannot substitute his conclusions for the conclusions to be found by the jury. He cannot say that a conceded condition is the result of the proven injury, where the producing cause thereof is the whole issue. *Ib.*

INSTRUCTIONS.

1. **Presumption: Impotency: Bastard Child.** The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable. Likewise, the presumption that a man who marries the mother of an adulterine bastard and subsequently recognizes such child as his own, was its father, is also rebuttable. And where there is testimony tending to show that at and prior to the child's birth he was impotent, an instruction declaring that he is presumed to have been the child's father from the fact of his marriage to the mother and his subsequent recognition of her illegitimate child as his own, is error, since it ignores and omits any reference to the evidence tending to overcome that presumption. *Drake v. Hospital Assn.*, 1.
2. **Defining Heat of Passion.** An instruction for murder in the second degree is not erroneous because it does not define the phrase "heat of passion." *State v. Cariou*, 82.
3. **Homicide: Manslaughter in Fourth Degree: No Provocation.** The giving of an instruction for manslaughter in the fourth degree is authorized only when the evidence shows that an assault has been committed or personal violence has been inflicted upon defendant, either of which constitute what is termed "lawful provocation," the presence of which will reduce murder to manslaughter. But testimony that deceased had seduced defendant's unmarried sister-in-law, who had been a member of her household; that he had placed pernicious literature in her hands, that he had abducted her from defendant's home under promise of marriage and had returned without her, or his remark to defendant when she made inquiry concerning her sister-in-law just before the shooting that he had taken her to a place to have pleasure with her, is not evidence of lawful provocation, and will not authorize an instruction for manslaughter in the fourth degree. *Ib.*
4. **Mental Incapacity: Covered by Others Given.** It is unnecessary to give an instruction submitting to the jury the question of defendant's mental capacity necessary to relieve her from liability for the commission of a crime, if the court has already at the request of the State given an instruction properly presenting the entire matter. *Ib.*
5. **Crime Against Nature: Consent as Defense.** Consent on the part of the woman to the insertion by defendant of his sexual organ in her mouth is no defense to a charge of the detestable and abominable crime against nature; nor can an instruction which tells the jury that it was immaterial whether the person so used or abused consented thereto or not, be condemned as unnecessary, or as erroneous, on the ground that, if prosecutrix consented, she was an accomplice, in which event corroboration of her testimony was necessary, in a case in which there is no evidence tending to show consent, and corroboration therefore was unnecessary, and the motion for a new trial contains no specific assignment on the subject. *State v. Katz*, 493.
6. **Slander: Confining Jury to Specific Charge.** In an action for slander, wherein the petition charges only that defendant in the presence of a named person called plaintiff a thief, an instruction which tells the jury that they cannot find for plaintiff unless they find from the evidence that defendant in the presence and hearing of said witness spoke the defamatory words stated, even though he spoke such words to other persons at

INSTRUCTIONS—Continued.

different times and places, is not error, if to it is added, or by another instruction the jury are told, that the word spoken to others may be considered for the purpose of showing malice. *Anderson v. Shockley*, 543.

7. ———: ———: Malice: Pleading. In a slander suit plaintiff must either confine himself to one publication as a basis of recovery, or charge each separate and distinct publication upon which he seeks a recovery in a separate count. But although he charges only one publication as the basis of his action, and can recover only for that, he is entitled to an instruction telling the jury that, if they find from the evidence that defendant spoke of and concerning plaintiff slanderous and defamatory words like those charged, they can consider such evidence as tending to show express malice. But he is not entitled to recover damages for such publication to others not charged. *Ib.*
8. Administration: Bonds in Widow's Possession: Where She Claims as Purchaser. In a suit by the administrator against decedent's widow to recover bonds in her possession, which she claims to own as a purchaser, and not as a gift from her husband, it is error to refuse an instruction declaring that if decedent, in his lifetime, purchased and paid for the bonds and they were delivered into his possession at the time of the purchase, the finding must be for plaintiff. *Carmody, Admr., v. Carmody*, 556.
9. ———: ———: ———. In such a case an instruction declaring that the statements made in the answers to the interrogatories propounded by the administrator to the wife that are in her own favor are not competent as evidence, and do not tend to prove, nor can they be considered as tending to prove, that the wife owned or acquired by gift or purchase from her husband, or otherwise, any of the bonds, is a correct declaration of law, and being applicable to the facts should be given. *Ib.*
10. Felonious Assault: Wounding With Fists: Presumption: Intention to Kill: Harmless. Evidence that defendant, wearing a heavy finger ring on one finger, struck the prosecuting witness with his fists, knocked him to a hard road, severely beat him on the head and over his eyes and ears and other parts of the body where great and permanent bodily injuries could have been easily afflicted, was sufficient to authorize an instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts," and that if they believe from the evidence the defendant assaulted the prosecuting witness "in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or to do him some great bodily harm." It is not required that a deadly weapon be used in order to justify such an instruction. *Held*, also, that, as this instruction was probably given more particularly in connection with the first count, which charged an assault with intent to kill or do great bodily harm, and defendant was acquitted on that count, and the second count charged wounding and maiming on which alone he was convicted, and nothing appearing to indicate that the severe injuries were not intentionally inflicted, he cannot complain of the instruction.

INSTRUCTIONS—Continued.

Held, by FARIS, J., dissenting with whom WOODSON, C. J., and GRAVES, J., concur, that the human fist, even when aided by a finger ring, is not judicially noticed as being a deadly weapon, and therefore the words of the instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts" were erroneous, since, under such circumstances, the law does not presume that death or great bodily harm is a natural or probable consequence. *State v. Webb*, 672.

11. **False Pretense; Under Abandoned Count.** An instruction in a prosecution for obtaining property by false pretense may be good under Sec. 4765, R. S. 1909 (amended in 1913), but not good under Sec. 4565, R. S. 1909 (as amended in 1911); and if the information contains two counts, one charging a crime under section 4565, and the other, a crime under section 4765, and the latter count is abandoned, an instruction bottomed on section 4765 and possibly good when tested by it, is bad if it does not meet the requirements of section 4565. *State v. Young*, 723.
12. ———: **Deception.** Instructions, in a prosecution for the false pretense denounced by Sec. 4565, R. S. 1909 (as amended in 1911), must require that the person alleged to have been defrauded was deceived by the false pretenses made by defendant; and if they do not contain such a requirement, a conviction under that statute cannot stand. *Ib.*

INSURANCE.

1. **Trust Company Securities: Depositary: State Bank Commissioner.** By the Act of March 25, 1915, repealing articles 1, 2 and 3 of chapter 12, R. S. 1909, and all intervening acts, and enacting three new articles in lieu thereof, the duties theretofore imposed upon the Superintendent of Insurance, as custodian of the securities required of trust companies as a guaranty of the proper performance of the business they are permitted by law to carry on, are transferred to the Bank Commissioner, and the securities required should now be deposited with said officer, and if heretofore deposited with the Superintendent of Insurance they should be transferred to the Bank Commissioner, upon condition of liability for any intervening obligation. *Trust Co. v. Revelle*, 202.
2. ———: ———: ———: **Transfer Upon Condition.** But such transfer should be made only upon the filing of a statement by the trust companies, both with the Superintendent of Insurance and the Bank Commissioner, that the deposit heretofore made with the Superintendent of Insurance shall be subject to any charges or liens which have arisen out of the obligations or business transacted by the trust companies since such deposit was made. *Ib.*
3. **Insurance Company: Organization: Agent to Sell Stock.** Under the statutes (Secs. 6895-6902, R. S. 1909) a charter of an insurance company cannot be adopted until its stock is subscribed, nor is there any corporation until the amount of the proposed stock has been subscribed. The persons designated as "corporators" in those statutes are only given power to open and keep open books to take subscriptions to the capital stock; they have no stock for sale, and are not authorized to sell stock upon the market or otherwise; nor do they have power, in

INSURANCE—Continued.

- behalf of the corporation, to enter into a contract with an agent to sell stock or proposed stock. *Taylor v. Ins. Co.*, 283.
4. ———: ———: ———: Purpose of Statute. The statutes mean that the cash paid or secured notes given for the stock of an insurance company, at the time of its organization, shall go into its corporate treasury, and shall not be depleted or diminished by percentages paid to an agent of the corporators for securing subscribers. And they apply in the same way to any surplus obtained from subscribers of the stock. *Ib.*
 5. ———: Contract with Agent Prior to Organization. A contract made with the chairman of the "corporators" or organization committee of an insurance company, to pay an agent a certain commission on all subscriptions he obtains to the company's corporate stock, having been made before its organization, is not binding on the company, or enforceable against it. *Ib.*
 6. ———: ———: Notice of Limited Powers. The "corporators" of an insurance company prior to its organization, are, under the statutes, agents of limited powers, and any one dealing with them must do so at his peril; and an agent, who enters into a contract with the chairman of the organization committee, who afterwards becomes its president, to obtain subscribers to its proposed capital stock, for a certain commission, is chargeable with notice that such chairman had no power to bind the corporation by such contract, for he is also chargeable with notice that under the statutes there can be no corporation until after the stock is subscribed, and that all the cash received from subscribers to stock must go into the company's treasury. *Ib.*
 7. Contracts: Accident Policy and Supplement: Construing Together. Where by the main policy an insurance company promised to pay ten thousand dollars to insured's mother in case of his accidental death "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running-board of railway or street railway cars)," and in the concurrent and separately signed supplement, supported by the one stipulated premium and attached to said main policy, promised to pay to insured five thousand dollars in case of the death of his mother "while riding as a passenger in a railway passenger car," the court cannot, in a suit by the insured to recover for the accidental death of his mother, which occurred as she was attempting to pass, in the nighttime, from one car of a fast moving train, across the unvestibuled platforms, to another car, consider the two contracts as one, and so construe them together as to hold that, though the covenants are independent and divisible, the words "while riding as a passenger in a railway passenger car," standing alone, mean while riding anywhere on the car, but when read in connection with the words contained in the main policy they do not mean while riding on the platform of a passenger car, but only inside the car; and by so construing the two instruments together, and thereby reaching the conclusion that the insured could not recover, the Court of Appeals violated the rule announced in *Trabue v. Insurance Co.*, 121 Mo. 75, and *Owings v. McKenzie*, 133 Mo. 325. The subject-matters of the two contracts are distinct, and they cannot be held to be one contract for the purpose of limiting the language of the one by the terms of the other. *State ex rel. v. Ellison*, 580.

INTEREST.

On Legacy: Collateral Attack. Whether or not the probate court erred in allowing interest on the legacy from one year after the grant of administration, instead of from the date of demand for the legacy and refusal to pay it, is of no concern in a collateral attack. Such mistakes, if in fact mistakes, could have been corrected on appeal, and since the probate court had jurisdiction of the matter, its judgment cannot be avoided by a collateral attack. *Harter v. Pettv*, 296.

INTERLOPER.

Curator. A person who has been appointed curator of the estate of a non-resident minor at the suggestion and upon the application of another who holds a power of attorney from the minor's mother and adult sister for the sale of their interests in the same lands, and who sold those interests to the same persons who purchased from the curator, cannot properly be characterized as an interloper. *Whittelsey v. Conniff*, 567.

INTERROGATORIES.

1. **Answers: As Pleadings and Evidence.** In a suit by an administrator to recover bonds in the possession of decedent's wife claimed by her as the owner, the written interrogatories propounded to her for answer and her written answers thereto are to be considered merely as pleadings in the case, and the statements contained in said answers cannot take the place of testimony, but testimony should be offered upon the trial as in any other case. *Carmody v. Carmody*, 556.
2. ———: ———: **Waiver.** Nor does the filing of interrogatories in such a case constitute a waiver of the incompetency of the wife to testify to transactions between her and her deceased husband involving the cause of action and at issue. *Ib.*
3. ———: ———: **Instruction.** In such a case an instruction declaring that the statements made in the answers to the interrogatories propounded by the administrator to the wife that are in her own favor are not competent as evidence, and do not tend to prove, nor can they be considered as tending to prove, that the wife owned or acquired by gift or purchase from her husband, or otherwise, any of the bonds, is a correct declaration of law, and being applicable to the facts should be given. *Ib.*

JEOPARDY.

1. **Habitual Criminal: No Crime.** The statute does not authorize a conviction upon a charge of being an habitual criminal; it does not make an habitual criminal habit an offense. It only provides a severer punishment for the crime committed because of defendant's persistence in criminal conduct. *State v. Collins*, 93.
2. ———: **Twice in Jeopardy.** The statute prescribing a greater punishment for a second offense than for the first does not put defendant twice in jeopardy of conviction or punishment for one offense. It simply prescribes a severer punishment for the subsequent offense. Its penalties cannot be inflicted unless he is convicted of the second or a subsequent offense, nor unless he has previously been convicted of a specific crime. *Ib.*

JUDGMENTS.

1. **Parties: Deceased Devisees: Ejectment: Judgment for Whole.** Where plaintiffs claim title through a will which devised one-third of the land in fee to his widow, who has died since the suit began, a judgment which gives the whole of the land to the descendants of testator's deceased son and only other devisee, is erroneous, unless there is a showing that said son was the only child of said widow and that she died the owner of said one-third and intestate as to him, or if testate that she devised the land to him or his descendants. *Keyes v. Munroe*, 114.
2. **Ejectment: Identity of Names.** From identity of name prima-facie identity of person is to be presumed; but this prima-facie case of identity is liable to be shaken by the slightest proof of facts which produce a doubt of identity. *Ib.*
3. ———: ———: **Reyes for Keyes: Deed Contradicted by Index.** If the only proof to contradict the record of a deed made in 1859 showing E. N. Reyes to be the grantee is the record index showing E. N. Keyes to be the grantee, a judgment in ejectment for the heirs of E. N. Keyes cannot stand. The deed in such case would be the best evidence. But proof *alunde* may be made that the deed was erroneously recorded, or that the name upon the record is Keyes and not Reyes, and that the apparent discrepancy arises from the age in the record or from blind writing; and if such proof of a substantial character is made, then the index is competent as a circumstance. *Ib.*
4. **Action on Specific Contract: Quantum Meruit.** Where plaintiff's pleadings are bottomed on a specific contract and the case is tried on that theory, a judgment cannot stand on *quantum meruit*. *Taylor v. Ins. Co.*, 283.
5. **Of Probate Court: Collateral Attack.** As to all matters of estates, the orders, judgments and proceedings of the probate court, made in furtherance of the statutory powers devolved upon it, are not subject to collateral attack, unless it affirmatively appears in some portion of the entire record that the steps necessary to the acquisition of jurisdiction were not taken. *Harter v. Petty*, 296.
6. ———: ———: **Silence of Record.** Mere silence of the record is not sufficient to overcome the presumption that a given judgment of a probate court was rendered after jurisdiction attached. *Ib.*
7. **Interest on Legacy: Collateral Attack.** Whether or not the probate court erred in allowing interest on the legacy from one year after the grant of administration, instead of from the date of demand for the legacy and refusal to pay it, is of no concern in a collateral attack. Such mistakes, if in fact mistakes, could have been corrected on appeal, and since the probate court had jurisdiction of the matter, its judgment cannot be avoided by a collateral attack. *Ib.*
8. **Administration: Final Settlement: When to be Made: When an Annual Settlement.** A final settlement, when lawfully made, destroys the estate as an entirety and ends all powers as such of its legal representative; its substance is distributed and its demise is complete. But the statute fixes no definite time when the estate shall be finally settled, but names a condition by which the time may be determined, and that condi-

JUDGMENTS—Continued.

tion is that the estate has been fully administered. A purported final settlement, made before the estate has been fully administered (for instance, while a suit against the administrator to establish a demand against the estate is still pending in the circuit or appellate court), has only the effect of an annual settlement, and beyond that is absolutely void. *State ex rel. v. Holtcamp*, 347.

9. ———: ———: **Administrator De Bonis Non.** After final settlement an administrator *de bonis non* can be appointed only upon the discovery of unadministered assets, and then only when there are unpaid allowed demands against the estate. But there is no need of an administrator *de bonis non* where the purported final settlement was unlawful, for that it was made before the estate was finally administered. In such case the purported final settlement, though approved by the probate court, is in legal effect an annual settlement, and the administrator continues to be its legal representative, unless removed upon some other statutory ground. *Ib.*
10. ———: ——— **Collateral Attack.** Full administration of the estate must really exist, regardless of the probate court's decision thereon, else a settlement, as a final one, is void, and subject to collateral attack. *Ib.*
11. ———: ———: **Unlawful: Discharge of Administrator.** If the purported final settlement, approved by the probate court, was unlawful, for that the estate had not been fully administered, there being demands legally pending and assets out of which they may be satisfied, and is for that reason to be considered in legal effect an annual settlement, the administrator is at all times after such purported final settlement the legal representative of the estate, unless previously lawfully and finally discharged on other grounds, and the estate is bound by all valid judgments in cases timely brought against him in any court of record in which he was duly served. *Ib.*
12. **Quieting Title and Ejectment: Judgment for Rents.** In a suit, in one count, to quiet title, and in another, in ejectment, where the judgment is that defendants have no title, and it is admitted that the monthly rents and profits are a certain sum since the date of ouster, plaintiff should have judgment on the first count quieting the title, and on the other judgment for possession and for monthly rents and profits.
Held, by WOODSON, C. J., dissenting, that the suit being one in equity, with all the incidents attaching thereto, the Legislature cannot control the judgment. *Miller v. Staggs*, 449.
13. **Public Administrator: Discovery of Will: Notice of Vacation of Assumed Authority.** The order of the probate court revoking the authority of the public administrator to administer an estate, made after the discovery and probate of decedent's will, is not void on the theory that he was entitled to notice of the court's intention to make the order, for two reasons: first, because, having before the discovery and probate of the will, filed his notice with the clerk of the probate court that he had taken charge of the estate, he was already in court, and is required by law to take notice of all papers, documents,

JUDGMENTS—Continued.

etc., filed in the case, except where actual notice is required by statute; and, second, because he had no vested right, as public administrator, to a hearing, his assumption to act being conditional upon the discovery, and probate of the will, and upon that condition happening, his right to further administer the estate *ipso facto* ceased, without any order of revocation. In re Brinckwirth, 473.

JURISDICTION.

1. **Appellate: State Board of Health a Party.** The jurisdiction of the members of the State Board of Health is coextensive with the State, and hence they are classed as State officers; and an appeal from the judgment of a circuit court quashing a writ of *certiorari* issued against the members of said board on behalf of a physician whose license to practice medicine had been revoked by them, is to the Supreme Court. *State ex-rel. v. State Bd. of Health*, 242.
2. **Judgment of Probate Court: Collateral Attack: Sale of Property Under Execution.** Where a legacy was given to a named legatee, there was money in the hands of the executor sufficient to pay it after all debts and other legacies as shown by the annual settlement had been paid, and more than two years had elapsed since letters testamentary had been granted, it will not be held, in the absence of any contrary showing by the record, that the probate court was without jurisdiction to make an order directing the legacy to be paid and to award execution thereon against the executor; and a sale of the executor's land by the sheriff in pursuance thereof, will not be held invalid on the ground that the probate court was without jurisdiction. *Harter v. Petty*, 296.
3. **Administration: Probate Courts: Concurrent Jurisdiction: To Establish Demands.** Section 34 of article 6 of the Constitution, providing for the establishment of probate courts and defining the bounds of their jurisdiction, did not vest in such courts exclusive jurisdiction, but only concurrent jurisdiction with other courts of record, to entertain suits against administrators for the establishment of demands against estates. And section 197, Revised Statutes 1909, in terms certain, authorizes the establishment of such demands in the circuit court. *State ex-rel. v. Holtcamp*, 347.
4. ———: **Establishing Demands in Circuit Court: Exhibition.** The due service of the summons upon the administrator, in an action begun in the circuit court within the time specified by statute after the issuance of letters of administration, is an exhibition of the demand sued on against the estate; and by the filing of the action and service of summons within such statutory period, the circuit court acquires jurisdiction (1) of the subject-matter, or demand, (2) of the person of the legal representative of the estate, and (3) of the estate, in so far as the demand and the right to have it determined are concerned. *Ib.*
5. ———: ———: ———: **Ousting Jurisdiction.** And jurisdiction of the circuit court having lawfully attached can be ousted or divested only by statutes clearly so providing. *Ib.*
6. ———: ———: **Final Settlement in Probate Court: Action Still Pending in Circuit Court.** The probate court is without

JURISDICTION—Continued.

jurisdiction to order the administrator to make final settlement of the estate so long as an action on a demand, timely brought, in which service of summons was timely obtained, is pending undecided in the circuit court, or on appeal to an appellate court; and a final settlement, made two years after notice of administration given, and approved by the probate court; and an order directing distribution and discharging the administrator, made while such suit is still pending in either the circuit or appellate court, are likewise void, nor can the payment of a claim established by the action in the circuit court be defeated by the prior approved final settlement and discharge. *Ib.*

7. ———: ———: ———: ———: **Estate Not Fully Administered.** The probate court has no jurisdiction to determine the liability of the estate upon a demand made the basis of an action timely and properly brought in the circuit court against the administrator, and until the estate's liability thereon is determined the estate is not fully administered; and the probate court has no jurisdiction to determine the estate is fully administered until its liability upon that demand is determined. *Ib.*
8. ———: ———: ———: **Demands Pending in Any Court.** The probate court is without jurisdictional power to approve a final settlement as long as in fact demands are legally pending and undisposed of, either in the probate court or other courts of record, and there are available assets for their satisfaction. *Ib.*
9. **Appellate: Title to Real Estate: Condemnation: Easement.** A suit by a city to condemn private land for sewer purposes involves title to real estate. Even though a cursory view may suggest that only the easement and not the fee is affected, yet it remains true that, though the fee remain in the owner, his right to the use and exclusive possession of the land is either lessened or taken away, and as a consequence the title is affected to the extent of the injury. *Moberly v. Lotter, 457.*
10. ———: ———: **Writ of Error Issued By Court of Appeals: Transfer to Supreme Court.** After a writ of error has been timely and properly sued out in a court of appeals in a case of which such court does not have appellate jurisdiction (in this case, because it involves title to real estate), that court has power to transfer the case to the Supreme Court, which will take jurisdiction in the same manner as it would had an appeal in the case been erroneously certified by the trial court to the Court of Appeals and by that court transferred to this court. [*GRAVES, J., and WOODSON, C. J., dissenting.*] *Ib.*
11. ———: ———: ———: **Constitutional Limitations and Statute.** The definitions of the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals contained in the Constitution and the limitation upon the right of either to issue writs of error to cases reviewable by it, must be construed in connection with the power given by the Constitution (Section 6 of Amendment of 1884 to Article 6) to the General Assembly to provide by legislation for the transfer of cases from the one court to the other, and that has been done by Section 3938, Revised Statutes 1909, directing the course to be pursued in case the writ is sued out in a court not having appellate

JURISDICTION—Continued.

jurisdiction. The authority conferred by this statute is not an exercise of jurisdiction, but of a power to determine whether or not jurisdiction exists, and in its absence, as determined by the court, to transfer the case to the court invested with power to review it. The constitutional provision defining the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals applies as well to writs of error as to appeals. *Moberly v. Lotter*, 457.

LANDS AND LAND TITLES.

1. **Guardian's Sale: For Less Than Three-Fourths of Appraised Value.** A private sale of real estate for less than three-fourths of its appraised value, whether by a guardian or administrator, is void, although approved by the probate court, for the court in such case has no jurisdiction to approve it. [Following *Carter v. Culbertson*, 100 Mo. 269, and overruling *Smith v. Black*, 231 Mo. 681.] *Miller v. Staggs*, 449.
2. **Quietling Title and Ejectment: Judgment for Rents.** In a suit, in one count, to quiet title, and in another, in ejectment, where the judgment is that defendants have no title, and it is admitted that the monthly rents and profits are a certain sum since the date of ouster, plaintiff should have judgment on the first count quietling the title, and on the other judgment for possession and for monthly rents and profits.
Held, by WOODSON, C. J., dissenting, that the suit being one in equity, with all the incidents attaching thereto, the Legislature cannot control the judgment. *Ib.*
3. **Minor: Sale of Land: By Curator Appointed Without Notice: Constitutional Right.** When the Legislature as *parens patriae* takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for his education and support, it does not deny him the equal protection of the laws, but gives him the protection of laws especially designed for his protection; it does not take from him his property, but uses it for his benefit. And the sale of a non-resident minor's land by a curator who was appointed by the probate court without notice to the minor of the application for such appointment, if otherwise done in harmony with the statute, which in 1879 did not require such notice, did not violate the provision of the Federal Constitution guaranteeing to him the equal protection of the laws, or the provision of the State Constitution declaring his property shall not be taken without due process of law. *Whittelsey v. Conniff*, 567.
4. ———: **Sale of Lands: Notice of Order of Sale.** The General Statutes of 1865 did not require that notice be given the minor of an application by the curator for an order of court to sell the lands of the minor. *Ib.*
5. **Curator: Resignation: No Formal Discharge: Sale by Subsequent Appointee.** Where the resignation of a duly appointed curator has been accepted by the probate court by an order entered of record, the fact that he was not formally discharged will not effect a sale of the minor's land by a subsequent curator duly appointed. *Ib.*

LAW OF CASE. See *Res Adjudicata*.

LEASEHOLD. See *Eminent Domain*, 4 and 5.

LEGISLATIVE POWERS.

1. **Constitutional Statute: Implied Legislative Limitation.** An implied limitation on the Legislature's power to enact a certain statute must be so clear and unmistakable as to make possible no other reasonable construction of the language used than that the power to enact the statute does not exist. A possible inference of its non-existence is not sufficient. *State ex rel. v. Burton*, 711.
2. ———: **Legislature: Power of Taxation: Instrumentalities.** The power to tax and to appropriate taxes is vested in the Legislature, and may be exercised within its discretion when not violative of an express provision of the Federal or State Constitution, and that power, in the absence of such restrictions, extends to a determination of the time, the amount, the nature and the purpose for which the tax is to be levied, and the creation of the agencies or instrumentalities for its collection and disbursement. *Ib.*

LEGITIMATION. See *Children*.

LICENSE, DRAMSHOP. See *Dramshops*.

LICENSE TO PRACTICE MEDICINE. See *Physician*.

LITIGATION, SETTLEMENT OF. See *Actions*.

LOCAL OPTION ELECTION.

1. **Number of Petitioners: Comparison With Poll Books.** The petition for a local option election signed by one-tenth of the qualified voters of that part of the county which embraces no city having 2500 inhabitants or more, vests the County Court with jurisdiction to call the election; and if so signed, the court is not without jurisdiction to call the election, on the sole ground that it is not signed by one-tenth of the qualified voters as shown by the poll books of the last general election. The proviso of the statute (Sec. 7238, R. S. 1909) declaring that "the County Court shall determine the sufficiency of the petition presented by the poll books of the last previous general election" simply means that the court shall take the presumptive evidence of the poll books that the names truly set forth the qualified voters who reside in the locality entitled to hold the election. If the petition is in fact signed by one-tenth of the qualified voters of such locality, that is enough. The law confers the right of petition upon the resident qualified voters, not upon the names on the polling lists; and if one-tenth of the resident qualified voters signed the petition, an election ordered by the County Court will not be held invalid, although an order therefor did not recite a comparison of the names of the petitioners with those on the poll books. *Bine v. Jackson County*, 228.
2. ———: ———: **Failure of Court.** The right given by the statute to one-tenth of the qualified voters of a local option district to petition for a local option election therein cannot be taken away by the failure or omission of the County Court to look to the poll books as evidence that the petitioners possessed the statutory qualification and residence. *Ib.*
3. **Construction of Statute: Harmonizing Terms.** A construction which defeats the chief object of a statute will never be forced by giving its terms a meaning beyond what is expressly stated. The end had in view, and the paramount intention of the lawmaker, afford a strong reason for harmonizing a statute. *Ib.*

LOCAL OPTION ELECTION—Continued.

4. **Number of Petitioners: How Determined.** The poll books are not the only method of determining whether a petition for a local option election has been signed by one-tenth of the qualified resident voters of the locality, nor does the statute say that they shall be the only test. They are not an infallible enumeration. The proviso only means that, nothing else appearing, the County Court must ascertain from the poll books whether or not the petition is signed by one-tenth of the qualified resident voters; but it does not confine their examination to these books. *Bine v. Jackson County*, 228.
5. ———: ———: **Explicit Finding.** An explicit finding by the County Court that the petition for the local option election outside of cities is signed by one-tenth of the qualified voters resident therein, is a substantial compliance with the statute, and (however that fact was ascertained) vested the court with ample authority to order an election and give due notice thereof. *Ib.*
6. **Irregularities.** The courts will not set aside a local option election on account of mere irregularities not essential to its valid holding. *Ib.*

LOCAL OPTION LAW.

physician: Grounds for Revoking License: Dishonorable Conduct. Allegations in the complaint and proof showing that defendant, in a local option town and county, in the course of six weeks filled out 778 blank prescriptions for whiskey alone, to be used as a beverage, by inserting in each of them the name of the purchaser, signing his own name thereto as a physician, and charging and receiving therefor twenty-five cents for each prescription so made out and signed, establish the charge of "guilty of unprofessional and dishonorable conduct," since every such prescription constituted a crime against the State, and authorized the State Board of Health to revoke, for a period of ten years, his license, or other right to practice medicine, however derived. *State ex rel. v. State Bd. of Health*, 242.

MAIMING AND WOUNDING.

1. **Felonious Assault: Wounding With Fists.** Under section 4483, Revised Statutes 1909, which is the maiming or wounding statute, it is not necessary to prove malice or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. The wounding and maiming may be done with the fists, and to support the charge it is not necessary to establish that the wounds were of a dangerous character, or such as are likely to produce death. *Held*, by FARIS, J., dissenting, with whom WOODSON, C. J., and GRAVES, J., concur, that it is essential that an information drawn under Sec. 4483, R. S. 1909, aver the circumstances themselves which, if death had ensued, would have made the offense manslaughter, and that not having been done it is unnecessary to rule whether said statute can be violated by an assault with fists, or by the fists aided adventitiously by a finger ring.
Held, also, that if it be true, as announced by the majority opinion, that it is not necessary to establish that the

MAIMING AND WOUNDING—Continued.

wounds inflicted were of a dangerous character or such as are likely to produce death, it logically follows that any wound is, under said statute, sufficient to constitute felonious assault, and thereby the boundary line between common and felonious assault has been wiped out.

Held, also that said section 4483 denounces but two crimes: 1, The endangering of the life of another; and 2, The infliction of great bodily harm, either by (a) wounding, (b) maiming, or (c) disfiguring. *State v. Webb*, 672.

2. ———: ———: Information. Under said statute it is not necessary to allege the particular means by which the wounding or maiming was done, since this may be accomplished by any means. *Ib*.
3. ———: ———: ———: Proof. An assault may be charged to have been committed by different means, and proof of any will sustain the charge. *Ib*.
4. ———: ———: Evidence of Provocation. The court did not err in withdrawing from the jury's consideration testimony to the effect that the prosecuting witness, a school teacher, some hours before the assault with fists, had chastised defendant's son. That chastisement was neither a defense to nor in mitigation of the charge of felonious assault under Sec. 4483, R. S. 1909, where the wounding and maiming did not result in death. *Ib*.
5. ———: ———: Instruction: Presumption: Intention to Kill: Harmless. Evidence that defendant, wearing a heavy finger ring on one finger, struck the prosecuting witness with his fist, knocked him to a hard road, severely beat him on the head and over his eyes and ears and other parts of the body where great and permanent bodily injuries could have been easily inflicted, was sufficient to authorize an instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts," and that if they believe from the evidence the defendant assaulted the prosecuting witness "in a manner likely to cause death or great bodily harm, the law presumes that he intended to kill him or to do him some great bodily harm." It is not required that a deadly weapon be used in order to justify such an instruction. *Held*, also, that, as this instruction was probably given more particularly in connection with the first count, which charged an assault with intent to kill or do great bodily harm, and defendant was acquitted on that count, and the second count charged wounding and maiming on which alone he was convicted, and nothing appearing to indicate that the severe injuries were not intentionally inflicted, he cannot complain of the instruction.

Held, by FARIS, J., dissenting, with whom WOODSON C. J., and GRAVES, J., concur, that the human fist, even when aided by a finger ring, is not judicially noticed as being a deadly weapon, and therefore the words of the instruction telling the jury that "the law presumes that a person intends the natural and probable consequences of his acts" were erroneous, since, under such circumstances, the law does not presume that death or great bodily harm is a natural or probable consequence. *Ib*.

MALICIOUS ASSAULT, LIABILITY FOR DAMAGES. See Corporations, 10.

MALPRACTICE. See Physician, 2 to 6.

MANDAMUS.

1. **No Plea to Return.** Unless relator pleads to respondent's return to an alternative writ of mandamus, either by motion for judgment on the pleadings, demurrer, answer, or such other proper plea as will join an issue for determination, especially where the return sets up material facts in conflict with the allegations in the writ, the alternative writ will be discharged and the proceedings dismissed. The statute (Sec. 2547, R. S. 1909) requires relator to "plead to or traverse all or any material facts contained in such return," and unless there is some appropriate plea no issue is joined or is raised for determination; and such has been the law since the revision of the statutes in 1845 (R. S. 1845, Ch. 112), and by them the common-law practice of bringing proceedings by mandamus to an issue was superseded. *State ex rel. v. Reynolds*, 12.
2. ———: **Neglect to Plead.** Where the cause has been pending in the Supreme Court after respondent's return a sufficient length of time to have enabled relator to plead to said return, and he has not filed any pleading to bring the cause to an issue or attempted to obtain further time in which to plead, the alternative writ will be discharged. *Ib.*
3. **Administration: Judgment: Refused Classification: Proper Remedy.** Where a probate court has refused to hear a matter over which it has jurisdiction, on the ground that it had no such jurisdiction, this court will issue its writ of mandamus to compel it to proceed. So that where the Supreme Court reversed a judgment of the circuit court in a suit brought against the administrator of an estate, and directed judgment against him in a definite amount, and the circuit court in compliance with that direction entered judgment and directed certification thereof be made to the probate court, and that court refused to act in the matter on the ground that the administrator had long previously made final settlement, which had been approved, and had been discharged, mandamus is the proper remedy to compel the probate court to classify the demand and proceed in the matter, because, if for no other reason, it is a proper method to compel the carrying out and giving effect to the judgment which the Supreme Court directed and commanded; and because (*BOND, J.*, concurring) there was no necessity for plaintiff to resort to other modes of redress, which might be applicable except for the conclusiveness of that judgment. *State ex rel. v. Holtcamp*, 347.

MANSLAUGHTER.

1. **By Automobile Driver: Sufficient Evidence.** Testimony that defendant was driving his automobile at a speed of fifteen to twenty miles an hour, at an intersection of two streets; that the view between him and the deceased pedestrian was unobstructed; that when deceased was ten or fifteen feet out in the street, after having left the sidewalk at the street intersection, and was walking in a straight direction, he was struck by the automobile and dragged twenty-five feet or more; that no warning or signal was heard; that deceased was apparently oblivious of the approach of the automobile until it was upon him; that going six miles an hour, as defendant testified, it

MANSLAUGHTER—Continued.

could have been stopped in three or four feet, and that when defendant first saw deceased he was within three feet of him, and instead of stopping his car he swerved it in an effort to avoid hitting him, is sufficient evidence to support a verdict of manslaughter in the fourth degree based upon culpable negligence. *State v. Horner*, 109.

2. ———: **Culpable Negligence: Definition.** An instruction defining "culpable negligence" as the failure to exercise "the highest degree of care which a very prudent and ordinarily skillful driver of an automobile would have used under the same or similar circumstances," and authorizing a conviction if the jury found that the death of the pedestrian at a street intersection resulted from the failure of defendant to exercise such "highest degree of care," is erroneous. *Ib.*
3. ———: **Definition in Civil Code.** The statute (Laws 1911, pp. 330-331) authorizing a recovery of damages in a civil action for a failure to exercise "the highest degree of care," has reference to civil actions only, and in no sense is to be considered a part of the criminal code. *Ib.*
4. ———: **Definition in Criminal Action.** Culpable negligence, as used in the statute (Sec. 4468. R. S. 1909) making the killing of a human being by the culpable negligence of another manslaughter in the fourth degree, is the omission to do something which a reasonable, prudent and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding each particular case. *Ib.*

MASTER AND SERVANT.

Corporation: Liability for Malicious Assault by Agent Upon Patron. A corporation, an express company and a common carrier, which had delivered a consignment of fruit to plaintiff, who, after refusing on account of a shortage in the shipment to sign a receipt therefor until the company's agent would present his claim for an allowance for the shortage, returned at the agent's request, given by telephone, to defendant's office for the purpose of discussing a settlement of the matter, and when near the office was met by said agent, who demanded that plaintiff then and there sign said receipt, and when plaintiff under protest was in the act of signing it, suddenly drew a pistol and without warning shot plaintiff, is liable in civil damages, both actual and punitive, to plaintiff for the injuries resulting from said assault; and a second count in the petition in which knowledge by defendant of the agent's violent temper, quarrelsome disposition and unfitness for his position, in addition to such other facts, is charged, also states a cause of action.

Held, by WOODSON, C. J., dissenting, with whom BLAIR, J., concurs, that the agent's act was a crime, personal to himself, in on way within the scope of his agency, and could not be authorized by the company, because unlawful, and being wholly unauthorized and unauthorizable, the company is not liable in civil damages for the injuries to plaintiff caused by his murderous assault. *Maniaci v. Express Co.*, 633.

MECHANIC'S LIEN.

1. **Sufficient Description.** A description of materials furnished by a dealer in lumber when made in abbreviations and trade terms known and understood to be in use in the trade, is a compliance with the statutory requirement that "such a statement of the claim as fairly appraises the owner and the public of the nature and amount of the demand asserted as a lien" shall be filed; and a decision of the Court of Appeals so holding is in harmony with *Henry v. Plitt*, 84 Mo. l. o. 241. *State ex rel. v. Reynolds*, 595.
2. ———: **Evidence of Items: Consolidation.** The mere fact that the lien account consolidates in one undated item several charges which show that each was for lumber of the same grade, quality, character and price, and which in the aggregate include the identical quantity of material and the identical amount charged in the consolidated bill, the whole being otherwise lienable matter, is not an objection the owner can urge against the lien claimant, even to the extent of avoiding the consolidated item, there being no proof of bad faith or of resulting injury to any one. *Ib.*
3. ———: ———: ———: **As Affecting Whole Account.** In no event can the consolidation of a few items of the lien account, the aggregate amounts and charges being equal to the amounts and charges of the consolidated items, invalidate the whole lien account, whatever may be its effect upon the items so consolidated. *Ib.*
4. ———: ———: **Excess in Summation.** The fact that the aggregate of the items in the bill of particulars exceeded those of the large lien account by the insignificant sum of \$2.46 is of no consequence. *Ib.*
5. ———: ———: **Dates.** The absence of dates in connection with particular items in a lien account is not important, when it appears from the account that the materials were furnished between given dates which fell within the beginning and close of the account. *Ib.*

MINOR'S ESTATE.

1. **Guardian's Sale: Less Than Three-Fourths of Appraised Value.** A private sale of real estate for less than three-fourths of its appraised value, whether by a guardian or administrator, is void, although approved by the probate court, for the court in such case has no jurisdiction to approve it. [Following *Carter v. Culbertson*, 100 Mo. 269, and overruling *Smith v. Black*, 231 Mo. 681.] *Miller v. Staggs*, 449.
2. **Minor: Sale of Land: By Curator Appointed Without Notice: Constitutional Right.** When the Legislature as *parens patriae* takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for his education and support, it does not deny to him the equal protection of the laws, but gives him the protection of laws especially designed for his protection; it does not take from him his property, but uses it for his benefit. And the sale of a non-resident minor's land by a curator who was appointed by the probate court without notice to the minor of the application for such appointment, if otherwise done in harmony with the statute, which in 1879 did not require such notice, did not violate the provision of

MINOR'S ESTATE—Continued.

the Federal Constitution guaranteeing to him the equal protection of the laws, or the provision of the State Constitution declaring his property shall not be taken without due process of law. *Whittelsey v. Conniff*, 567.

3. **Non-resident Minor: Over Fourteen Years: Choosing Curator.** The General Statutes of 1865 did not give to a non-resident minor having real estate in this State, either under or over fourteen years of age, the right to choose his curator, or to have notice of the application for the appointment of a curator. *Ib.*
4. ———: **Curator: Interloper.** A person who has been appointed curator of the estate of a non-resident minor at the suggestion and upon the application of another who holds a power of attorney from the minor's mother and adult sister for the sale of their interests in the same lands, and who sold those interests to the same persons who purchased from the curator, cannot properly be characterized as an interloper. *Ib.*
5. ———: **Sale of Lands: Notice of Order of Sale.** The General Statutes of 1865 did not require that notice be given the minor of an application by the curator for an order of court to sell the lands of the minor. *Ib.*
6. **Curator: Resignation: No Formal Discharge: Sale by Subsequent Appointee.** Where the resignation of a duly appointed curator has been accepted by the probate court by an order entered of record, the fact that he was not formally discharged will not affect a sale of the minor's land by a subsequent curator duly appointed. *Ib.*

MORTGAGE AND DEED OF TRUST. See Conveyances.

MOTION FOR NEW TRIAL

1. **Constitutional Question: Raised in Motion: No Bill of Exceptions.** An attack upon the validity of a certain statute, made for the first time in the motion for a new trial, if the abstract contains no part of the bill of exceptions, cannot be considered on appeal. A motion for a new trial is not a part of the record proper, but a part of the bill of exceptions, wherein must be preserved an exception to the overruling of the motion; and if the abstract contains no bill of exceptions, any assignment made in the motion for a new trial alone cannot be considered on appeal, although that motion is printed in the abstract as a part of the record proper. *State ex rel. v. State Bd. of Health*, 242.
2. **Motion to Dismiss Sustained: No Motion for New Trial.** Where one ground of a motion to dismiss as to movents was that the record shows on its face that if plaintiff ever had a right to establish a mechanic's lien on their property such right had expired, and that part of the motion only is sustained, and an appeal is taken by plaintiff from that judgment to the Court of Appeals, that court, having otherwise appellate jurisdiction in the matter, cannot refuse to consider the point raised by the motion upon the ground that it required a motion for new trial to preserve the point for review. No motion for a new trial was necessary, nor did a proper determination of the point put in issue require an examination of the evidence,

MOTION FOR NEW TRIAL—Continued.

nor was evidence necessary or even proper. Things appearing on the face of the record conclusively speak for themselves. *State ex rel. v. Ellison*, 423.

3. **Public Service Commission: Appeal: No Motion for New Trial: No Bill of Exceptions.** The statute makes the appellate procedure pertaining to appeals in civil cases applicable to appeals from the rulings of the circuit court affirming, upon *certiorari*, the action of the Public Service Commission; and unless the evidence before the circuit court is preserved in a bill of exceptions, and kept alive by a motion for a new trial, there is nothing for review on appeal to the Supreme Court except the bare record of the proceedings in the circuit court. Even though the case be denominated one in equity, there can be no review of the evidence, unless there is both a motion for a new trial and a bill of exceptions. *Macon v. Public Service Comm.*, 484.

MOTION TO DISMISS.

1. **Practice: Equal to Demurrer.** The legal character of a pleading is to be determined by its substance, and not by its name. A motion to strike out or to dismiss may fill the office of a demurrer, and be so treated, where it is, to all intents and purposes, a demurrer, and dispositive of the whole case, as a matter of law. *State ex rel. v. Ellison*, 423.
2. ———: **Grounds Assigned.** On appeal the court must presume that the trial court sustained a motion to dismiss on the ground specifically assigned by it—in this case, that a motion to dismiss is sustained on the “first ground” assigned in that motion, which was that the petition showed on its face that the right to a mechanic’s lien sought by it had expired. *Ib.*

NAMES.

1. **Ejectment: Identity of Names.** From identity of name *prima-facie* identity of person is to be presumed; but this *prima-facie* case of identity is liable to be shaken by the slightest proof of facts which produce a doubt of identity. *Keyes v. Munroe*, 114.
2. ———: ———: **Reyes for Keyes: Deed Contradicted by Index.** If the only proof to contradict the record of a deed made in 1859 showing E. N. Reyes to be the grantee is the record index showing E. N. Keyes to be the grantee, a judgment in ejectment for the heirs of E. N. Keyes cannot stand. The deed in such case would be the best evidence. But proof *alunde* may be made that the deed was erroneously recorded, or that the name upon the record is Keyes and not Reyes, and that the apparent discrepancy arises from the age in the record or from blind writing; and if such proof of a substantial character is made, then the index is competent as a circumstance. *Ib.*

NEGLIGENCE.

1. **Practice: Foreign Tort.** In a suit in a circuit court of this State for damages resulting from a tort committed in another State, all matters of practice are governed and must be determined by the laws of this State. *Miller v. Railroad*, 19.
2. **Definition: Due Care.** Due care is a care adjusting itself to the circumstances of the case, and negligence is the absence of that care. *Ib.*

NEGLIGENCE—Continued.

3. **Alighting from Caboose: Stock Train: Caretaker.** A caretaker, who accompanies and rides in a stock car in a freight train for the purpose of caring for the animals, and who leaves it when it stops in the terminal yards to go to the caboose for the purpose of obtaining a block with which to repair a partition in that car, may alight from the caboose anywhere it may be standing within the limits of the yard, unless some local element of unsuitability should appear. *Ib.*
4. ———: ———: ———: **Contributory Negligence.** A caretaker, who is authorized by his transportation contract to ride in the stock car for the purpose of caring for the animals, and who, when the train stops in the terminal yards finds that a partition in the car needs repairing and is told by a trainman that he can obtain the block he needs at the caboose, which is the next car, leaves his car and safely enters the caboose, and while there, without his knowledge or the knowledge of the experienced brakeman also present, the caboose is moved to an undecked open bridge fifty feet high, of which he knows nothing, and having, four or five minutes later, received the block, and not knowing or being informed that the caboose is on the bridge, turns and leaves it by way of its steps, the time being dark and there being no lights which enable him to see the situation, is not guilty of contributory negligence in stepping off into the dark abyss. *Ib.*
5. ———: ———: ———: **Negligence of Railroad.** A railroad company, which, for its own profit, requires shippers of stock and their caretakers, strangers to its road and yards, to care for the stock in transit, and to get on and off the cars whenever and wherever necessary for that purpose, in the nighttime as well as by day, and without reference to the stations used for receiving and discharging other passengers, the inducement being more of a command than an invitation, is in duty bound to exercise a care for the safety of such caretakers as broad as the peculiar conditions and dangers attending their rightful movements; and does not exercise the high degree of care that the law exacts from a carrier for the protection of the lives of its passengers, when it permits its caboose, which it has invited such caretaker in the performance of his duties to enter, while standing in a place of safety, to be run upon an open bridge over a rocky canyon forming a part of its terminal yards, without warning or other notice of the situation to the caretaker. *Ib.*
6. **Excessive Verdict: Under California Statute: \$18,000.** The statute of California authorizes the heirs of one negligently killed to recover "such damages as under the circumstances of the case may be just;" and the courts of that State have held that these words confine the recovery to pecuniary damages alone, but that these do not consist simply of compensation for the destruction of legal rights, but include also the loss to the heir of the society, comfort and care of deceased, and the destruction of those kindly relations of which the heir has the moral right to expect the continuance. *Held*, that a verdict for eighteen thousand dollars for an aged and infirm widow, who lived alone with deceased, an unmarried son aged forty-seven years, a lawyer whose income was from \$2500 to \$3000 a year, domestic in his habits, spending all his evenings with her and supporting her entirely from his own income, negligently killed in California, is too large by eight thousand dollars. *Ib.*

NEGLIGENCE—Continued.

7. **Witness: Competency: Tort: Death of Tortfeasor.** Section 6354, Revised Statutes 1909, declaring that where one of the original parties to a cause of action in issue and on trial is dead, the other party to such cause of action shall not be admitted to testify, applies to actions *ex delicto*; and, therefore, where plaintiff sues a railroad company to recover damages on account of personal injuries claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment, and thereby created the cause of action, and said agent is dead at the time of the trial, the plaintiff is not permitted under the statute to detail in evidence his version of the controversy and the assault made upon him. [Approving *Leavea v. Southern Railroad Co.*, 171 Mo. App. 24, and disapproving *Drew v. Wabash Ry. Co.*, 129 Mo. App. 459.] *Leavea v. Railroad*, 151.
8. **Party to Action: Against Interstate Carrier: Negligent Death of Employee: Wife or Administratrix.** An action for damages for the negligent killing of an employee of a railroad company engaged, at the very instant of his negligent injury in this State, in interstate commerce, should, in view of the Employers' Liability Act of Congress, be brought by decedent's legal representative, and cannot be maintained by his widow in her individual name under section 5425, Revised Statutes 1909. The action does not accrue to her as an individual, but accrues to decedent's legal representative. *Sells v. Railroad*, 155.
9. ———: ———: ———: ———: **Waiver: By Failure to Plead.** Nor did the railroad company waive the point that the action for damages was wrongfully brought in the widow's individual name, instead of in her representative capacity, as decedent's administratrix, by failing to plead the Federal Employers' Liability Act in bar to the action, or by proceeding to trial as if the action had been properly brought and prosecuted under the State statute, if the petition alleged the railroad company was an intrastate carrier, and the answer was, among other pleas, a general denial, for such an answer raised the issue of the company's intrastate character. *Ib.*
10. **Pleading: Office of General Denial.** Under the Code of Missouri the function of a general denial is simply to put in issue the facts pleaded in the petition, not the liability. *Ib.*
11. ———: ———: **Corporation: Pleading Under Oath.** A charge in the petition that defendant is a corporation is taken as true, unless defendant denies the same under oath. But an answer unaccompanied by such oath admits only the defendant's corporate existence; it does not admit the character of the corporation, such, for instance, that it is an intrastate carrier. *Ib.*
12. **Party to Action: Against Interstate Carrier: Scope of Federal Employers' Liability Act.** The Employers' Liability Act of Congress completely covered the subject of the liability of an interstate carrier to its employees, and superseded all State statutes on the subject; and as it provides that an action for the negligent killing of such an employee accrues to his legal representative, the State statute, authorizing such action to be brought by his widow, is no longer operative, but as to interstate carriers has been *pro tanto* repealed by the exercise by Congress of its constitutional power to regulate commerce among the States. *Ib.*

NEGLIGENCE—Continued.

13. ———: ———: ———: **Waiver.** Nor can such superior power of Congress be waived, for said Employers' Liability Act gives to the legal representative of the negligently killed employee of the interstate carrier a cause of action, and the undisputed facts being that defendant is an interstate carrier, a petition alleging it to be an intrastate carrier states no cause of action under superseded section 5425, Revised Statutes 1909. *Held*, by GRAVES, J., concurring, that the right of the widow to recover damages for the negligent killing of her husband is purely statutory, and is given her by the State statute; but the Employers' Liability Act of Congress, as to interstate carriers and their employees, superseded and *pro tanto* repealed that statute, and left to the widow no cause of action, but declared such cause of action should accrue to his legal representative; and therefore a petition which alleges defendant railroad company was an intrastate carrier and names her, as his widow, in her individual capacity, as plaintiff, states no cause of action, when it is shown that defendant is an interstate carrier. *Ib.*
14. ———: ———: ———: **Raised by Demurrer, Etc.** Whenever a petition fails to state facts sufficient to constitute a cause of action under the law, that vice may be taken advantage of by demurrer, or objection to the introduction of testimony, or by any other appropriate plea filed at any time in any court in which the case is pending. *Ib.*
15. ———: ———: **Federal Employers' Liability Act: Not Pleaded: Waiver.** Nor does the interstate defendant waive the supremacy of the Federal Employers' Liability Act and its control of the suit for damages for the negligent killing of its employee, by not pleading it and by trying the case as if properly brought and prosecuted under the State statute, for the reason such act is a public act, of which all courts must take judicial notice, and being such it is not necessary to plead it, and for the further reason that the act having superseded the State statute on the subject, no cause of action exists without it. *Ib.*
16. ———: ———: ———: **Waiver: Pleading Contributory Negligence.** The plea of contributory negligence by the interstate carrier is not inconsistent with the Employers' Liability Act of Congress. Under it contributory negligence can be shown in mitigation of damages, and therefore must be pleaded; while under the State statute contributory negligence is a defense. *Ib.*
17. ———: ———: ———: **Change in Pleading.** It was not the design of the Federal Employers' Liability Act to change the principles and forms of pleading, especially where the case is brought under that act in a State court. *Ib.*
18. **Structure: As Used in Statute: Does Not Include Hoist.** A hoist used in lifting stones to the top of a fire wall which is being constructed, is not either a structure or a scaffold within the meaning of those words as used in the statute (Sec. 7843, R. S. 1909) declaring that "all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or

NEGLIGENCE—Continued.

articles as may be used, placed or deposited thereon;" and a demurrer should be sustained to a civil action for damages bottomed upon a violation of said statute, brought by a workman, who, while riding on a hoist carrying a stone, was injured when it suddenly broke and fell to the ground. *Deiner v. Sutermeister*; 505.

19. ———: *Ejusdem Generis* As Scaffold. The "structure" used in said statute is *ejusdem generis* as "scaffold," and both words are to be construed as meaning scaffolds, or contrivances and appliances of similar use and nature to scaffolds, such as platforms, stages, trestles of whatever kind, and ladders supporting planks. *Ib.*
20. Testimony: Expert: Insanity: Cause. Where the issue is whether plaintiff's insanity was congenital or was caused by a fall of the stone-carrying hoist on which he was riding, it is error to permit a medical expert, who did not see the fall nor examine plaintiff for nearly a year afterwards, to testify that "a blow of that character could have caused insanity." He cannot substitute his conclusions for the conclusions to be found by the jury. He cannot say that a conceded condition is the result of the proven injury, where the producing cause thereof is the whole issue. *Ib.*

NEW STATE CAPITOL, FURNITURE. See Capitol.

PARTIES TO ACTIONS.

1. Against Interstate Carrier: Negligent Death of Employee: Wife or Administratrix. An action for damages for the negligent killing of an employee of a railroad company engaged, at the very instant of his negligent injury in this State, in interstate commerce, should, in view of the Employers' Liability Act of Congress, be brought by decedent's legal representative, and cannot be maintained by his widow in her individual name under section 5425, Revised Statutes 1909. The action does not accrue to her as an individual, but accrues to decedent's legal representative. *Sells v. Railroad*, 155.
2. ———: ———: ———: Walver: By Failure to Plead. Nor did the railroad company waive the point that the action for damages was wrongfully brought in the widow's individual name, instead of in her representative capacity, as decedent's administratrix, by failing to plead the Federal Employers' Liability Act in bar to the action, or by proceeding to trial as if the action had been properly brought and prosecuted under the State statute, if the petition alleged the railroad company was an intrastate carrier, and the answer was, among other pleas, a general denial, for such an answer raised the issue of the company's intrastate character. *Ib.*
3. Against Interstate Carrier: Scope of Federal Employers' Liability Act. The Employers' Liability Act of Congress completely covered the subject of the liability of an interstate carrier to its employees, and superseded all State statutes on the subject; and as it provides that an action for the negligent killing of such an employee accrues to his legal representative, the State statute, authorizing such action to be brought by his widow, is no longer operative, but as to interstate carriers has been *pro tanto* repealed by the exercise by Congress of its constitutional power to regulate commerce among the States. *Ib.*

PARTIES TO ACTIONS—Continued.

4. ———: ———: Waiver. Nor can such superior power of Congress be waived, for said Employers' Liability Act gives to the legal representative of the negligently killed employee of the interstate carrier a cause of action, and the undisputed facts being that defendant is an interstate carrier, a petition alleging it to be an intrastate carrier states no cause of action under superseded section 5425, Revised Statutes 1909.

Held, by GRAVES, J., concurring, that the right of the widow to recover damages for the negligent killing of her husband is purely statutory, and is given her by the State statute; but the Employers' Liability Act of Congress, as to interstate carriers and their employees, superseded and *pro tanto* repealed that statute, and left to the widow no cause of action, but declared such cause of action should accrue to his legal representative; and therefore a petition which alleges defendant railroad company was an intrastate carrier and names her, as his widow, in her individual capacity, as plaintiff, states no cause of action, when it is shown that defendant is an interstate carrier. *Ib.*

5. Insanity After Suit Brought. Even though the gist of the action is damages for insanity superinduced by negligent injuries, and the fact of insanity and the demand for damages therefor are brought into the case by an amended petition, plaintiff may maintain in his own name, without a guardian or next friend, a suit begun while he was sane. *Deiner v. Sutermeister*, 505.

PHYSICIAN.

1. Grounds for Revoking License: Dishonorable Conduct. Allegations in the complaint and proof showing that defendant, in a local option town and county, in the course of six weeks filled out 778 blank prescriptions for whiskey alone, to be used as a beverage, by inserting in each of them the name of the purchaser, signing his own name thereto as a physician, and charging and receiving therefor twenty-five cents for each prescription so made out and signed, establish the charge of "guilty of unprofessional and dishonorable conduct," since every such prescription constituted a crime against the State, and authorized the State Board of Health to revoke, for a period of ten years, his license, or other right to practice medicine, however derived. *State ex rel. v. State Bd. of Health*, 242.

2. Evidence: Admission: Undenied Statement of Another: Malpractice. A defendant cannot be charged with an undenied damaging voluntary statement made by a party out of his presence, when to deny it would require him to shout his denial up a stairway to a woman in the employ of his co-defendant.

Held, by WALKER, J., dissenting, that visual and immediate physical presence is not necessary to authorize the application of the rule which renders testimony in regard to a damaging statement competent, and construes silence, under a proper condition, to be an admission of the truth of such statement; hearing and understanding, and not mere proximity, are the tests of the admissibility of such testimony. *State ex rel. v. Ellison*, 604.

3. ———: ———: ———: Silence: Impertinence: Personal Security. A failure by a defendant to reply to a damaging
266 Mo. 52.

PHYSICIAN—Continued.

statement cannot be held to be an admission of its truth and is not admissible in evidence: first, if made under such circumstances as affords him no opportunity to reply, for instance, if the denial must be shouted up a stairway; second, if it is a voluntary statement made by the office girl or other mere employee of a co-defendant, who may have adverse interests, and therefore not demanding a denial; third, if voluntarily made by a stranger (that is, a person not a party to the action) and, therefore, an impertinence; and, fourth, if made under such circumstances that the defendant, as a matter of personal security, has a right to ignore it.

Held, by WALKER, J., dissenting, that, where two physicians had offices on different floors of the same building and the one below had treated the patient of the other, and when the officer came to serve the summons on them in the action for civil damages by the patient, the one below called up the stairs to the office girl of the other, to know if she had a record in the case, and she replied that she had and that the patient was the school teacher into whose eye he had dropped iodine and put it out, the answer was not a voluntary statement, nor an impertinence, but made by one whose authority to give it was recognized by the physician, and should have been admitted as evidence of his acquiescence therein. *State ex rel. v. Ellison*, 604.

4. ———: ———: Probative Force. A failure to deny or to reply to a voluntary statement made by a stranger to the action to a defendant, is the weakest of all evidence in probative force, and is not admissible as an admission of its truth except when made under such circumstances as point clearly to the necessity for a reply. *Ib.*

PLEADING.

1. *Mandamus: No Plea to Return.* Unless relator pleads to respondent's return to an alternative writ of mandamus, either by motion for judgment on the pleadings, demurrer, answer, or such other proper plea as will join an issue for determination, especially where the return sets up material facts in conflict with the allegations in the writ, the alternative writ will be discharged and the proceedings dismissed. The statute (Sec. 2547, R. S. 1909), requires relator to "plead to or traverse all or any material facts contained in such return," and unless there is some appropriate plea no issue is joined or is raised for determination; and such has been the law since the revision of the statutes in 1845 (R. S. 1845, Ch. 112), and by them the common-law practice of bringing proceedings by mandamus to an issue was superseded. *State ex rel. v. Reynolds*, 12.
2. ———: ———: Neglect to Plead. Where the cause has been pending in the Supreme Court after respondent's return a sufficient length of time to have enabled relator to plead to said return, and he has not filed any pleading to bring the cause to an issue or attempted to obtain further time in which to plead, the alternative writ will be discharged. *Ib.*
3. *Former Acquittal: Habitual Criminal.* Ordinarily the plea of *autrefois acquit* or *autrefois convict* should set out fully and accurately the former indictment, because the identity of the two offenses is the very gist of the plea, and because, before it is availing, the former conviction or acquittal must be had

PLEADING—Continued.

upon a valid indictment, and such identity and validity cannot otherwise be made to appear. But where the plea is directed to an indictment which alleges a former conviction and thereby seeks to charge defendant as an habitual criminal, it is not necessary to set out in the plea more than the indictment itself is required to contain, and to sustain the charge of being an habitual criminal it is required to allege only in general terms the conviction, date thereof, sentence, imprisonment and discharge upon compliance with the sentence. *State v. Collins*, 93.

4. ———: ———: **Plea of Former Jeopardy.** Where the indictment charges defendant with the crime of larceny and with having been convicted of a former larceny in 1909, a plea to the indictment to the effect that he is being twice put in jeopardy of the offense of being an habitual criminal, and should be discharged, for that he was in 1911 acquitted under an indictment charging he was an habitual criminal, is not sufficient, for the reason that it is not distinctly pleaded that he was acquitted of the crime then charged to him. If he was convicted of the crime itself, but was acquitted on the charge of having been formerly convicted, this fact should have been distinctly pleaded, and it is not. *Ib.*
5. **Office of General Denial.** Under the Code of Missouri the function of a general denial is simply to put in issue the facts pleaded in the petition, not the liability. *Sells v. Railroad*, 155.
6. ———: **Corporation: Pleading Under Oath.** A charge in the petition that defendant is a corporation is taken as true, unless defendant denies the same under oath. But an answer unaccompanied by such oath admits only the defendant's corporate existence; it does not admit the character of the corporation, such, for instance, that it is an intrastate carrier. *Ib.*
7. ———: **Raised by Demurrer, Etc.** Whenever a petition fails to state facts sufficient to constitute a cause of action under the law, that vice may be taken advantage of by demurrer, or objection to the introduction of testimony, or by any other appropriate plea filed at any time in any court in which the case is pending. *Ib.*
8. ———: ———: **Federal Employers' Liability Act: Not Pleaded: Waiver.** The interstate defendant does not waive the supremacy of the Federal Employers' Liability Act and its control of the suit for damages for the negligent killing of its employee, by not pleading it and by trying the case as if properly brought and prosecuted under the State statute, for the reason such act is a public act, of which all courts must take judicial notice, and being such it is not necessary to plead it, and for the further reason that the act having superseded the State statute on the subject, no cause of action exists without it. *Ib.*
9. ———: ———: **Waiver: Pleading Contributory Negligence.** The plea of contributory negligence by the interstate carrier is not inconsistent with the Employers' Liability Act of Congress. Under it contributory negligence can be shown in mitigation of damages, and therefore must be pleaded; while under the State statute contributory negligence is a defense. *Ib.*
10. ———: ———: ———: **Change in Pleading.** It was not the design of the Federal Employers' Liability Act to change

PLEADING—Continued.

the principles and forms of pleading, especially where the case is brought under that act in a State court. *Sells v. Railroad*, 155.

11. **Slander: Confined to One Publication: Malice.** In a slander suit plaintiff must either confine himself to one publication as a basis of recovery, or charge each separate and distinct publication upon which he seeks a recovery in a separate count. But although he charges only one publication as the basis of his action, and can recover only for that, he is entitled to an instruction telling the jury that, if they find from the evidence that defendant spoke of and concerning plaintiff slanderous and defamatory words like those charged, they can consider such evidence as tending to show express malice. But he is not entitled to recover damages for such publication to others not charged. *Anderson v. Shockley*, 543.
12. ———: ———: **Rule Not Changed by Statute.** The common-law rule has not been so changed by statute as to relieve plaintiff in a slander suit from the necessity of definitely averring when and where the defamatory publication was made. The statute (Sec. 1837, R. S. 1909) has changed the rule only to the extent of relieving him of the necessity of alleging "any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter." *Ib.*
13. **Answers to Interrogatories: As Pleadings and Evidence.** In a suit by an administrator to recover bonds in the possession of decedent's wife claimed by her as the owner, the written interrogatories propounded to her for answer and her written answers thereto are to be considered merely as pleadings in the case, and the statements contained in said answers cannot take the place of testimony, but testimony should be offered upon the trial as in any other case. *Carmony, Admr., v. Carmony*, 556.

POWERS OF CONGRESS. See *Negligence*, 7 to 17.

PRACTICE.

1. **Foreign Tort.** In a suit in a circuit court of this State for damages resulting from a tort committed in another State, all matters of practice are governed and must be determined by the laws of this State. *Miller v. Railroad*, 19.
2. **Unconstitutional Statute: Objection at Trial.** The objection that certain parts of a statute are a wrongful delegation of legislative power and therefore unconstitutional, being one that does not go to the whole act, to be available on appeal, should be made at the trial. *In re Birmingham Dr. Dist.*, 60.
3. **Motion to Dismiss: Equal to Demurrer.** The legal character of a pleading is to be determined by its substance, and not by its name. A motion to strike out or to dismiss may fill the office of a demurrer, and be so treated, where it is, to all intents and purposes, a demurrer, and dispositive of the whole case, as a matter of law. *State ex rel. v. Ellison*, 423.
4. ———: **Evidence: Appeal: No Motion for New Trial.** Where one ground of a motion to dismiss as to movents was that the record shows on its face that if plaintiff ever had a right to establish a mechanic's lien on their property such right had expired, and that part of the motion only is sustained, and an appeal is taken by plaintiff from that judgment

PRACTICE—Continued.

to the Court of Appeals, that court, having otherwise appellate jurisdiction in the matter, cannot refuse to consider the point raised by the motion upon the ground that it required a motion for new trial to preserve the point for review. No motion for a new trial was necessary, nor did a proper determination of the point put in issue require an examination of the evidence, nor was evidence necessary or even proper. Things appearing on the face of the record conclusively speak for themselves. *Ib.*

5. ———: ———: ———: ———: **Other Grounds of Motion.** Nor does the fact that the motion to dismiss contained other grounds, which could be sustained only by evidence, and that evidence was offered in support of them, and they were not sustained, alter the right of the plaintiff on appeal, without any motion for a new trial filed in the trial court, to have that part of the motion charging that the amended petition showed on its face that plaintiff's right to a mechanic's lien had expired, and which was separately sustained, considered by the appellate court—not even though movents had done the useless thing of supporting the point by evidence. *Ib.*
6. **Parties to Action: Insanity After Suit Brought.** Even though the gist of the action is damages for insanity superinduced by negligent injuries, and the fact of insanity and the demand for damages therefor are brought into the case by an amended petition, plaintiff may maintain in his own name, without a guardian or next friend, a suit begun while he was sane. *Deiner v. Sutermeister*, 505.
7. **Constitutionality of Statute: Not Timely Raised.** The Supreme Court on appeal will not consider the constitutionality of a statute upon which plaintiff has bottomed his case, where defendant did not raise the question of its invalidity until he had lost his case and came to file his motion for a new trial. Ordinarily a constitutional question must be lodged in a case as soon as is procedurally possible after the statute, order, judgment or thing alleged to be unconstitutional appears in the case. *Ib.*

PRESCRIPTIONS FOR WHISKEY. See *Physician*.

PRINCIPAL AND AGENT.

1. **Insurance Company: Contract to Sell Stock: Purpose of Statute.** The statutes mean that the cash paid or secured notes given for the stock of an insurance company, at the time of its organization, shall go into its corporate treasury, and shall not be depleted or diminished by percentages paid to an agent of the corporators for securing subscribers. And they apply in the same way to any surplus obtained from subscribers of the stock. *Taylor v. Ins. Co.*, 283.
2. ———: **Contract with Agent Prior to Organization.** A contract made with the chairman of the "corporators" or organization committee of an insurance company, to pay an agent a certain commission on all subscriptions he obtains to the company's corporate stock, having been made before its organization, is not binding on the company, or enforceable against it. *Ib.*
3. ———: ———: **Notice of Limited Powers.** The "corporators" of an insurance company prior to its organization, are, under the statutes, agents of limited powers, and any one deal-

PRINCIPAL AND AGENT—Continued.

ing with them must do so at his peril; and an agent, who enters into a contract with the chairman of the organization committee, who afterwards becomes its president, to obtain subscribers to its proposed capital stock, for a certain commission, is chargeable with notice that such chairman had no power to bind the corporation by such contract, for he is also chargeable with notice that under the statutes there can be no corporation until after the stock is subscribed, and that all the cash received from subscribers to stock must go into the company's treasury. *Taylor v. Ins. Co.*, 283.

4. **Failure to Sell Stock at Agreed Price.** When plaintiff agreed to sell stock at \$200 for each share of \$100 par value, and for his services was to receive ten per cent of the amount he so sold, he cannot, in a suit on the contract and not in *quantum meruit*, recover for stock sold at less than \$200 a share. And an agreement by a trust company to put up, for incorporation purposes merely, an amount of money equal to \$200 per share of the stock sold to it, with the understanding that one-half of it is to be returned to it after the company is duly incorporated, cannot be twisted into a sale at \$200 per share. *Ib.*
5. **Action on Specific Contract: Quantum Meruit.** Where plaintiff's pleadings are bottomed on a specific contract and the case is tried on that theory, a judgment cannot stand on *quantum meruit*. *Ib.*

See, also, Corporations, 10.

PROBATE COURT.

1. **Courts: Legislative Jurisdiction.** As to a constitutionally recognized court, it is a general rule that the Legislature can neither add to nor subtract from the jurisdiction provided for it by the Constitution. And the enumeration in the Constitution of certain specific powers, with no hint of others to be added by law, is to be considered as an exclusion of all other powers. *State ex rel. v. Locker*, 384.
2. **Power to Issue Habeas Corpus and Injunction Writs.** The Constitution enumerates the matters of which probate courts shall take cognizance, and neither a proceeding in *habeas corpus* nor a writ of injunction is among them, nor is either akin to the subjects named. The Constitution confers no power upon probate courts to issue writs of *habeas corpus* or injunction; and so much of section 2442, Revised Statutes 1909, as attempts by the use of the words "some court of record" to confer upon probate courts such power, is unconstitutional and void. *Ib.*
3. **Habeas Corpus: What Courts May Issue.** The Supreme Court, courts of appeals, circuit courts and county courts (when aided by statute) have a constitutional warrant for issuing writs of *habeas corpus*, but the Constitution confers no such power on probate courts, nor does it authorize the Legislature to confer it. *Ib.*

See, also, Courts.

PUBLIC ROAD DISTRICT. See Roads and Highways.

PUBLIC SCHOOL FUNDS. See Revenue.

PUBLIC SCHOOLS.

1. **Consolidated School District: Signers of Petition: Residence.** The petition to the county superintendent for the establishment of a consolidated school district under the Act of March 14, 1913, Laws 1913, p. 721, is not required to be signed by qualified voters of every existing district to be affected. The statute requires the petition to be signed by twenty-five qualified voters of the community, and a "community" may include several districts or parts of districts, and as used in the statute means resident citizens of a locality in more or less proximity. *State ex inf. v. Jones, 191.*
2. ———: **Inclusion of Parts of Districts Not Named in Petition.** The statute does not require that the petition for the establishment of a consolidated school district shall fix absolutely its boundaries. The county superintendent is given authority to include within its boundaries parts of existing districts not named in the petition. *Ib.*
3. ———: ———: **Infringement of Constitutional Right.** There is no infringement upon the constitutional right of an existing school district by taking from it a part of its territory and including it within the boundaries of the consolidated district proposed to be formed, without giving to the voters of the part not taken the right to vote on the question of organization of the consolidated district. The Legislature is given the power to provide methods of forming new districts, changing the boundary lines of old ones and dividing existing districts. *Ib.*
4. ———: **Voters.** The voters within the consolidated school district as bounded by the county superintendent are entitled to vote on the question of the organization thereof, and the statute gives no persons outside that territory the right to object because he was not consulted. *Ib.*
5. ———: **Certification: Addressed to County Clerk.** The statute does not require the certificate showing the proceedings of the meeting by which the organization of the consolidated school district was affected, to be addressed to the county clerk. It simply requires the proceedings of the meeting to be certified to him. *Ib.*
6. ———: ———: **The Word "Certify."** The word certify is not indispensable to a certificate. It means to give certain knowledge or information, or to testify with certainty in writing. *Ib.*
7. ———: ———: **Sufficiency.** A written statement setting forth the place and time of the special meeting called by the county superintendent to pass on the question of the organization of a consolidated school district, that the qualified voters met as per the call, that they were called to order by said superintendent, that a certain voter was elected chairman and another secretary, that the chairman ordered a ballot taken on the proposition, that it resulted in so many votes for consolidation and so many against, and that six directors were elected, etc., and signed by the chairman and secretary and sworn to by them, contains the facts required to be certified by the statute, and is not insufficient as a matter of law. *Ib.*
8. ———: **Construction of Statute.** No strict or technical construction is to be put upon the statute authorizing the or-

PUBLIC SCHOOLS—Continued.

ganization of consolidated school districts. It was designed as a workable method by plain, honest, worthy citizens not specially learned in the law. *State ex inf. v. Jones*, 191.

9. ———: **Policy of Statute.** As long as the Legislature violates no constitutional restriction upon its acts, the wisdom of any act is not subject to review by the courts; nor can the courts consider the policy of an act authorizing the consolidation of school districts when applied to sparsely settled communities, or when applied to a single district already organized which contains a large part of the voting population in the community or territory affected by the proposed consolidation. *Ib.*

PUBLIC SERVICE COMMISSION.

1. **Findings As to Necessity of Interchange Railroad Track.** The finding of the Public Service Commission that the evidence discloses such a pressing public demand or necessity for the construction of an interchange track by two railroads at the point where their lines cross each other as to warrant the expenditure of the amount of money which the evidence shows the track will cost, is not final and conclusive upon the courts authorized to review its actions. *Railroad v. Public Service Comm.*, 333.
2. **Limitations Upon Powers.** The origin and powers of the Public Service Commission are purely statutory, and it has no authority save that given it by express statute, and save such implied authority as may be necessary to carry into effect the authority expressly given. *Ib.*
3. **Evidence and Procedure.** The evidence in any case appealed from the Public Service Commission is required to be preserved and transferred to the circuit court, and that court determines the case on that evidence; and on appeal from the circuit court, the full substance, if not the entire evidence, must be brought to the Supreme Court, and this court determines the propriety of the judgment of the circuit court upon that evidence, as in an equity proceeding, by a trial *de novo*, and will direct the circuit court to affirm or reverse the judgment of the commission, but not to modify it, nor will it direct the dismissal of the proceedings, since its jurisdiction is derivative. *Ib.*
4. **Interchange Railroad Track: Unreasonable Burden.** A connecting or interchange track between two railroads whose lines cross each other (one thirty-five feet above the other's track) is not a facility included within the absolute duties of a railway company; and where the evidence clearly shows that the cost of constructing such interchange track will be very large and the cost of maintaining it will far exceed all probable income to the railroad companies from operating it, and there is no demonstrated public necessity for its construction, as shown by the evidence and the small amount of previous shipments, the judgment of the circuit court affirming the judgment of the Public Service Commission ordering it to be constructed, will be reversed. *Ib.*
5. ———: ———: **Costs.** The question of the expense of constructing and maintaining such a track is of great importance in determining whether the judgment of the commission imposes an unjust burden upon the railroad companies. *Ib.*

PUBLIC SERVICE COMMISSION—Continued.

6. **Not a Court.** The Public Service Commission is not a court. *Macon v. Public Service Comm.*, 484.
7. **Appeal.** On appeal from the rulings of the circuit court, requiring the Public Service Commission to receive evidence which it had refused to receive, it is the rulings or errors of the court that are for review, and not those of the commission. *Ib.*
8. ———: **No Evidence.** In the absence from the record of the evidence adduced before the circuit court there can, on appeal, be no review of its rulings: (a) where the circuit court, upon *certiorari*, had affirmed the action of the Public Service Commission and approved its admission of evidence; or (b) where the circuit court had reversed and remanded the case to the commission for errors in refusing to admit relevant and competent evidence; or (c) where, upon the facts adduced in evidence, the finding of the commission was erroneous as a matter of right and equity and good conscience. *Ib.*
9. ———: ———: **No Motion for New Trial: No Bill of Exceptions.** The statute makes the appellate procedure pertaining to appeals in civil cases applicable to appeals from the rulings of the circuit court affirming, upon *certiorari*, the action of the Public Service Commission; and unless the evidence before the circuit court is preserved in a bill of exceptions, and kept alive by a motion for a new trial, there is nothing for review on appeal to the Supreme Court except the bare record of the proceedings in the circuit court. Even though the case be denominated one in equity, there can be no review of the evidence, unless there is both a motion for a new trial and a bill of exceptions. *Ib.*

QUANTUM MERUIT.

1. **Agent: Failure to Sell Stock at Agreed Price.** Where plaintiff agreed to sell stock at \$200 for each share of \$100 par value, and for his services was to receive ten per cent of the amount he so sold, he cannot, in a suit on the contract, and not in *quantum meruit*, recover for stock sold at less than \$200 a share. And an agreement by a trust company to put up, for incorporation purposes merely, an amount of money equal to \$200 per share of the stock sold to it, with the understanding that one-half of it is to be returned to it after the company is duly incorporated, cannot be twisted into a sale at \$200 per share. *Taylor v. Ins. Co.*, 283.
2. ———: **Action on Specific Contract.** Where plaintiff's pleadings are bottomed on a specific contract and the case is tried on that theory, a judgment cannot stand on *quantum meruit*. *Ib.*

QUIETING TITLE.

Judgment for Rents. In a suit, in one count, to quiet title, and in another, in ejectment, where the judgment is that defendants have no title, and it is admitted that the monthly rents and profits are a certain sum since the date of ouster, plaintiff should have judgment on the first count quieting the title, and on the other judgment for possession and for monthly rents and profits.

Held, by WOODSON, C. J., dissenting, that the suit being one in equity, with all the incidents attaching thereto, the Legislature cannot control the judgment. *Miller v. Staggs*, 449.

RAILROADS.

1. **Alighting from Caboose: Stock Train: Caretaker.** A caretaker, who accompanies and rides in a stock car in a freight for the purpose of caring for the animals, and who leaves it when it steps in the terminal yards to go to the caboose for the purpose of obtaining a block with which to repair a partition in that car, may alight from the caboose anywhere it may be standing within the limits of the yard, unless some local element of unsuitability should appear. *Miller v. Railroad*, 19.
2. ———: ———: ———: **Contributory Negligence.** A caretaker, who is authorized by his transportation contract to ride in the stock car for the purpose of caring for the animals, and who, when the train stops in the terminal yards finds that a partition in the car needs repairing and is told by a trainman that he can obtain the block he needs at the caboose, which is the next car, leaves his car and safely enters the caboose, and while there, without his knowledge or the knowledge of the experienced brakeman also present, the caboose is moved to an undecked open bridge fifty feet high, of which he knows nothing, and having, four or five minutes later, received the block, and not knowing or being informed that the caboose is on the bridge, turns and leaves it by way of its steps, the time being dark and there being no lights which enable him to see the situation, is not guilty of contributory negligence in stepping off into the dark abyss. *Ib.*
3. ———: ———: ———: **Negligence of Railroad.** A railroad company, which, for its own profit, requires shippers of stock and their caretakers, strangers to its road and yards, to care for the stock in transit, and to get on and off the cars whenever and wherever necessary for that purpose, in the nighttime as well as by day, and without reference to the stations used for receiving and discharging other passengers, the inducement being more of a command than an invitation, is in duty bound to exercise a care for the safety of such caretakers as broad as the peculiar conditions and dangers attending their rightful movements; and does not exercise the high degree of care that the law exacts from a carrier for the protection of the lives of its passengers, when it permits its caboose, which it has invited such caretaker in the performance of his duties to enter, while standing in a place of safety, to be run upon an open bridge over a rocky canyon forming a part of its terminal yards, without warning or other notice of the situation to the caretaker. *Ib.*
4. **Public Service Commission: Findings as to Necessity of Interchange Railroad Track.** The finding of the Public Service Commission that the evidence discloses such a pressing public demand or necessity for the construction of an interchange track by two railroads at the point where their lines cross each other as to warrant the expenditure of the amount of money which the evidence shows the track will cost, are not final and conclusive upon the courts authorized to review its actions. *Railroad v. Public Service Commission*, 333.
5. ———: **Limitations Upon Powers.** The origin and powers of the Public Service Commission are purely statutory, and it has no authority save that given it by express statute, and save such implied authority as may be necessary to carry into effect the authority expressly given. *Ib.*

RAILROADS—Continued.

6. ———: Evidence and Procedure. The evidence in any case appealed from the Public Service Commission is required to be preserved and transferred to the circuit court, and that court determines the case on that evidence; and on appeal from the circuit court, the full substance, if not the entire evidence, must be brought to the Supreme Court, and this court determines the propriety of the judgment of the circuit court upon that evidence, as in an equity proceeding, by a trial *de novo*, and will direct the circuit court to affirm or reverse the judgment of the commission, but not to modify it, nor will it direct the dismissal of the proceedings, since its jurisdiction is derivative. *Ib.*
7. ———: Interchange Railroad Track: Unreasonable Burden. A connecting or interchange track between two railroads whose lines cross each other (one thirty-five feet above the other's track) is not a facility included within the absolute duties of a railway company; and where the evidence clearly shows that the cost of constructing such interchange track will be very large and the cost of maintaining it will far exceed all probable income to the railroad companies from operating it, and there is no demonstrated public necessity for its construction, as shown by the evidence and the small amount of previous shipments, the judgment of the circuit court affirming the judgment of the Public Service Commission ordering it to be constructed, will be reversed. *Ib.*
8. ———: ———: ———: Costs. The question of the expense of constructing and maintaining such a track is of great importance in determining whether the judgment of the commission imposes an unjust burden upon the railroad companies. *Ib.*

RES ADJUDICATA.

1. Habitual Criminal: No Crime. The statute does not authorize a conviction upon a charge of being an habitual criminal; it does not make an habitual criminal habit an offense. It only provides a severer punishment for the crime committed because of defendant's persistence in criminal conduct. *State v. Collins*, 93.
2. ———: Twice in Jeopardy. The statute prescribing a greater punishment for a second offense than for the first does not put defendant twice in jeopardy of conviction or punishment for one offense. It simply prescribes a severer punishment for the subsequent offense. Its penalties cannot be inflicted unless he is convicted of the second or a subsequent offense, nor unless he has previously been convicted of a specific crime. *Ib.*
3. Confession: Law of Case. A ruling upon a former appeal that a written confession obtained by the police captain and other officers from defendant was as a matter of law not voluntary and therefore inadmissible, becomes the law of the case on a second trial, unless a different state of facts is shown. *State v. Powell*, 100.
4. ———: Swearing Away Legal Defects. Legal defects which arose from the State's affirmative proof and which as a matter of law destroyed the voluntary character of defendant's alleged confession on the former trial, cannot be sworn away by the same witnesses upon the second trial without a commission

RES ADJUDICATA—Continued.

of perjury. If the facts pertaining to the voluntary character of the confession were fully developed at the first trial, a holding that, upon the State's own showing, the confession was not voluntary and therefore inadmissible, became the law of the case on a second trial. *State v. Powell*, 100.

5. ———: **Other Oral Confessions.** But the inadmissibility of that written confession, obtained by policemen after continually "sweating" defendant for eleven hours, does not affect the admissibility of a prior oral confession made to a special officer which was not involved in the former ruling. *Ib.*
6. ———: **Guilt Dependent Upon.** Considerations of justice demand that great caution should be used and great exactness required in determining the admissibility of a confession by defendant where without that confession there is no substantial evidence of his guilt; and especially should that caution be observed where the confession contains a statement of fact which is conclusively shown to be false. *Ib.*

REVENUE.

1. **Meaning of Word.** Unrestricted by the word "ordinary," the word "revenue" as used in the Appropriation Act of 1915, declaring that "there is hereby appropriated out of the State Revenue Fund, to be applied to the support of the public schools of the State, one-third of the ordinary revenue paid into the State Treasury for the fiscal years from July 1, 1914, to June 30, 1916," means "the annual and current income of the State, however derived, which is subject to appropriation for general uses." This definition excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use, or which is not required to be paid into the State Revenue Fund, but into a special fund, among which are the collateral inheritance tax, the money derived from license fees on motor vehicles, fees paid into the State Treasury to the credit of the Insurance Department Fund, and other funds of a similar sort. *State ex rel. v. Gordon*, 394.
2. ———: **As Used in Constitution.** The words "State revenue" used in section 7 of article 11 of the Constitution, requiring at least "twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools," refer back to the words "ordinary revenue of the State," used in section 6 of said article, for their definition; but neither expression affords a clear-cut guide as to what income of the State is included. *Ib.*
3. **Means Ordinary Revenue.** The word "revenue" as used in the Constitution and in the Appropriation Act of 1915 is limited by the word "ordinary," for both instruments use the words "ordinary revenue" in referring to the appropriations for the support of the public schools; and every appropriation act since 1877, except that of 1895, has used either the words "ordinary State revenue" or "ordinary revenue;" and so historically and lexically the word "revenue" when used in connection with an appropriation for the support of public schools means "ordinary revenue"—that is, revenue or income arising from usual methods of taxation. *Ib.*
4. **Ordinary Revenue: Meaning.** The words "ordinary revenue," as used in section 6 of article 11 of the Constitution and

REVENUE—Continued.

in section 1 of the Appropriation Act of 1915, Laws 1915, p. 89, mean "the regular and usual annual income of the State, however derived, which is subject to appropriation for general public uses." *Ib.*

5. ———: **Administrative Interpretation and Practice.** The interpretation put upon the words "ordinary revenue" used in the Constitution and appropriation acts, for a long series of years, by the executive officers of the State upon whom the duty of interpretation is cast, and long acquiesced in by the Legislature, is, in the absence of other qualifying considerations, decisive; but where new sources of income have recently been provided by law, and there has been no uniformity of interpretation by such officers, the rule is of no aid. *Ib.*
6. ———: **Share of Public Schools: Taxes.** Under the Appropriation Act of 1915, appropriating "one-third of the ordinary revenue paid into the State Treasury" to the support of the public schools, one-third of all moneys received as taxes on real or personal property from county collectors, and one-third of the county foreign insurance tax, the private car tax and the express companies' tax, was properly applied to that purpose. *Ib.*
7. ———: ———: **Things Not Included.** But receipts from old bond and coupon accounts, from amounts refunded, from insurance on Federal Soldiers' Home, from sale of old furniture, from itinerant vendors' licenses, and from Fish Commissioner's fund, are not ordinary revenue, and one-third thereof cannot be so applied. *Ib.*
8. ———: ———: **Warehouse and Grain Department Fees.** Only one-third of the net revenue left, after paying all operating expenses, of the money or fees collected by the Warehouse and Grain Department for the inspection of hay and grain, are appropriated by the words "ordinary revenue" to the public schools, since the department was not intended to be an earner of profits, but only to pay its own way. *Ib.*
9. ———: ———: **State as Trustee: General Rule as to Earnings.** The general rule should be that whenever a statute creating a department of government of this State provides, or whenever an appropriation act for the support of such a department contains a proviso, that the cost of maintaining and operating it shall be defrayed wholly from fees earned by it, and not otherwise, the State is, as to an amount equal to the cost of upkeep, a trustee merely of the moneys paid into the State Treasury, and its general revenue fund is entitled only to the surplus after deducting the operating expenses. As to all such departments the term "revenue" means net revenue. *Ib.*
10. ———: ———: ———: **Compensation Not Dependent Upon Earnings.** But when the payment of operating expenses of any department of the State government is not dependent upon its earnings, and the earnings are required by express statute to go directly to the State Treasurer, the gross sum of its earnings is to be considered as ordinary revenue. The earnings of the Public Service Commission, State Auditor and Secretary of State are ordinary revenue, since the statutes provide for the payment of the expenses of all those departments whether they earn fees or not, and that the fees earned by them are to be paid into the State Treasury. *Ib.*

REVENUE—Continued.

11. ———: ———: **Interest.** Interest accruing to the State from moneys deposited in banks or other depositaries is to be considered "ordinary revenue," unless it arises from a special fund and by express statutory provision the interest is to be expended for the identical purpose for which the special fund from which it accrues is to be spent. State ex rel. v. Gordon, 394.
12. ———: ———: **Fines: Not Ordinary Revenue.** Fines paid into the State Treasury in pursuance to a judgment of the Supreme Court finding certain corporations guilty of a violation of the anti-trust laws, are revenue, but not "ordinary revenue," and the State Auditor is not required by an appropriation of one-third of the "ordinary revenue" to the support of the public schools, to apply them to that purpose. Ib.
13. ———: ———: **Insurance Department Fund.** Neither are the moneys which for some years have been intermittently transferred from the "Insurance Department Fund" to the General Revenue Fund ordinary revenue, and no part of them is to be applied to the public schools. They are not annual or current revenue, are required to be paid into a special fund, and only the overflow reaches the State Revenue Fund, and then only in pursuance to an express and special act, passed, ordinarily, biennially. Ib.
14. ———: ———: **Factory Inspection Fund.** Neither the gross nor the net income from the Factory Inspection Fund is a part of the "ordinary revenue" appropriated to the support of the public schools, for the reasons: First, such income, or fees, go into a special fund, and the net amount is not paid into the General Revenue Fund in regular and annual payments, but biennially only; and, second, the fund is primarily devoted to the payment of the expenses of the department, and no excess of expenses over income can be made up from general revenue. Ib.
15. ———: ———: **Examiners Appointed by State Auditor.** Only the net earnings of the examiners appointed by the State Auditor to examine and audit the books of the several counties and divers State institutions, should be counted as "ordinary revenue," since the statute seems to contemplate that only the excess of their earnings, after their salaries are paid, is to pass to the State Revenue Fund. Ib.
16. ———: ———: **Other Sources of Income.** Having adopted as a guide the rule that "ordinary revenue" within the purview of the Appropriations Act of 1915 declaring that "one-third of the ordinary revenue paid into the State Treasury" during the biennial period are appropriated to the support of the public schools, means "regular and usual annual income of the State which is subject to appropriation for general public purposes," it is held that the entire income from certain specific sources enumerated is embraced within the act (whether arising from taxation or gross earnings); that the net (but not the gross) earnings of other departments enumerated are also included; and that certain other sources of income, which comes into the State Treasury biennially, or intermittently, also enumerated, are excluded. Ib.

REVOCATION OF LICENSE. See Physician.

ROADS AND HIGHWAYS.

1. **Constitutional Statute: Implied Legislative Limitation.** An implied limitation on the Legislature's power to enact a certain statute must be so clear and unmistakable as to make possible no other reasonable construction of the language used than the power to enact the statute does not exist. A possible inference of its nonexistence is not sufficient. *State ex rel. v. Burton*, 711.
2. ———: ———: **Twenty-five Cent Road Tax: Expended by County Court.** The provision of section 11 of article 10 of the Constitution authorizing the county court to levy and collect a tax of not more than twenty-five cents on each hundred dollars' valuation, to be used for road and bridge purposes, and for no other purpose whatever, does not give the county court exclusive power to expend the fund, and does not contain a limitation upon the power of the Legislature to authorize the money so raised to be expended by the commissioners of a special road district so clear and unmistakable as to justify the conclusion that such power does not exist. *Ib.*
3. ———: ———: **Expended by County Court: Administration of County Affairs.** Section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is not unconstitutional on the theory that the Constitution created county courts to transact the business of the counties and vested them with express jurisdiction to construct and repair roads, even though it contains an implied limitation that the road tax fund be expended under the direction of those courts. *Ib.*
4. ———: **Legislature: Power of Taxation: Instrumentalities.** The power to tax and to appropriate taxes is vested in the Legislature, and may be exercised within its discretion when not violative of an express provision of the Federal or State Constitution, and that power, in the absence of such restrictions, extends to a determination of the time, the amount, the nature and the purpose for which the tax is to be levied, and the creation of the agencies or instrumentalities for its collection and disbursement. *Ib.*
5. ———: **Class Legislation: Special Road Districts.** Sections 10594 and 10591, Revised Statutes 1909 (repealed and reenacted in 1913, Laws 1913, pp. 674, 675), are not unconstitutional as class legislation. They apply to all road districts which may be organized as bodies corporate and are conducted in conformity with their provisions. *Ib.*
6. ———: ———: ———: **Indefinite Territory.** The fact that much or little of the territory of the county may be included in a special road district does not render invalid the statutes authorizing their organization. *Ib.*
7. ———: **Special Road Districts: Public Purpose.** Taxes expended by a special road district on public highways are used for a public purpose. *Ib.*
8. ———: ———: **Uniform Taxation.** Special road district statutes operate alike upon all persons within the district, and do not violate the rule for uniformity of taxation. *Ib.*
9. ———: ———: **Collection of Taxes Within Cities.** The statutes, in authorizing the levy and collection of taxes in spe-

ROADS AND HIGHWAYS—Continued.

cial road districts outside of cities, do not violate that part of section 10 of article 10 of the Constitution which forbids the Legislature to impose taxes and appropriate money levied and collected by city authorities to uses and purposes outside of such cities. *State ex rel. v. Burton*, 711.

10. ———: ———: **Lending Credit, Etc.** The statutes creating and governing special road districts do not violate sections 46 and 48 of article 4 of the Constitution which prohibit the Legislature from granting public money to individuals, or municipal or other corporations, and from authorizing any municipality or other political corporation from lending its credit in aid of any individual or corporation. *Ib.*
11. ———: ———: **Maximum Rate of Taxation.** Special road districts are not included within the provisions of sections 11 and 12 of article 10 of the Constitution which fix the maximum rates of "taxes for county, city, town and school purposes." *Ib.*

SALE OF REAL ESTATE.

Guardian's Sale: For Less Than Three-Fourths of Appraised Value. A private sale of real estate for less than three-fourths of its appraised value, whether by a guardian or administrator, is void, although approved by the probate court, for the court in such case has no jurisdiction to approve it. [Following *Carter v. Culbertson*, 100 Mo. 269, and overruling *Smith v. Black*, 231 Mo. 681.] *Miller v. Staggs*, 449.

SALES.

Agent: Failure to Sell Stock at Agreed Price. Where plaintiff agreed to sell stock at \$200 for each share of \$100 par value, and for his services was to receive ten per cent of the amount he so sold, he cannot, in a suit on the contract, and not in *quantum meruit*, recover for stock sold at less than \$200 a share. And an agreement by a trust company to put up, for incorporation purposes merely, an amount of money equal to \$200 per share of the stock sold to it, with the understanding that one-half of it is to be returned to it after the company is duly incorporated, cannot be twisted into a sale at \$200 per share. *Taylor v. Ins. Co.*, 283.

SCAFFOLD, INSURING SAFETY. See *Structure*, 1 and 2.

SCHOOLS. See *Public Schools*.

SETTLEMENT OF LITIGATION. See *Actions*.

SLANDER.

1. **Instruction: Confining Jury to Specific Charge.** In an action for slander, wherein the petition charges only that defendant in the presence of a named person called plaintiff a thief, an instruction which tells the jury that they cannot find for plaintiff unless they find from the evidence that defendant in the presence and hearing of said witness spoke the defamatory words stated, even though he spoke such words to other persons at different times and places, is not error, if to it is added, or by another instruction the jury are told, that the words spoken to others may be considered for the purpose of showing malice. *Anderson v. Shockley*, 543.

SLANDER—Continued.

2. ———: ———: Malice: Pleading. In a slander suit plaintiff must either confine himself to one publication as a basis of recovery, or charge each separate and distinct publication upon which he seeks a recovery in a separate count. But although he charges only one publication as the basis of his action, and can recover only for that, he is entitled to an instruction telling the jury that, if they find from the evidence that defendant spoke of and concerning plaintiff slanderous and defamatory words like those charged, they can consider such evidence as tending to show express malice. But he is not entitled to recover damages for such publication to others not charged. *Ib.*
3. Pleading: Rule Changed by Statute. The common-law rule has not been so changed by statute as to relieve plaintiff in a slander suit from the necessity of definitely averring when and where the defamatory publication was made. The statute (Sec. 1837, R. S. 1909) has changed the rule only to the extent of relieving him of the necessity of alleging "any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter." *Ib.*

SODOMY IN MOUTH. See Crime Against Nature.

SPECIAL ROAD DISTRICTS. See Roads and Highways.

STATE CAPITOL FURNITURE. See Capitol.

STATE OFFICER. See Jurisdiction.

STATUTES AND STATUTORY CONSTRUCTION.

1. Legitimation: Adulterine Bastard. The statute contemplates the legitimation of adulterine bastards the same as it does other children born out of lawful wedlock whose parents subsequently marry. *Drake v. Hospital Assn.*, 1.
2. Title to Act: Broad Enough to Include Amendment. The title to the Act of 1879, being "An Act to provide for the formation of drainage districts, to reclaim and drain swamp and overflowed lands in this State," was broad enough to include provision for any work, whether drain or levee, effectual for the purposes of reclamation; and in consequence, any subsequent amendment by mere reference to that act by section, article and chapter, as it later appeared in the Revised Statutes, fell within the title, so long as it related to the general purposes of reclamation; and all subsequent amendments have related thereto, and have been germane to the subject-matter of that act. In re Birmingham Drainage District, 60.
3. Drainage Districts: So Named in Act: Include Levees. The fact that the Act of 1879 and subsequent amendments thereto have designated districts organized thereunder as "drainage districts" does not limit the activities of such districts to digging ditches, nor shear them of the power expressly given to construct levees. *Ib.*
4. ———: Power to Construct Levees. The Act of 1879 contemplated the construction of levees by drainage districts, and the Act of March 24, 1913, Laws 1913, p. 232, which by the processes of amendment has grown out of the Act of 1879, expressly provides for the construction of levees by such districts. *Ib.*

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STATUTES AND STATUTORY CONSTRUCTION—Continued.

5. ———: ———: **Exclusive Methods.** The Act of April 7, 1913 (Laws 1913, p. 290) does not provide an exclusive method for the organization of districts when the construction of levees is contemplated. In re Birmingham Drainage Dist., 60.
6. ———: **Levees and Drains: Two Similar Statutes.** The fact that the Legislature by progressive amendments has brought the Act of 1879 (now Act of March 24, 1913, Laws 1913, p. 232) and the Act of 1887 (now Act of April 7, 1913, Laws 1913, p. 290) into almost exact harmony as to the character of lands which may be included in a district, the persons who may move for its incorporation and the methods to be employed in working out its destiny, does not destroy any part of the Act of March 24, 1913, or limit the powers by it explicitly conferred upon a district organized under it. A district may be organized under that act for the purpose of reclaiming overflow land by the construction of a levee. *Ib.*
7. ———: **Delegation of Legislative Power to Engineer.** That part of section 10 of the Act of March 24, 1913 (Laws 1913, p. 232), which provides that the plan of reclamation, as reported by the engineer, or modifications thereof as approved by him after consultation, shall be adopted by the board of supervisors, is not unconstitutional as a delegation of legislative power to the engineer. In the nature of things there must be a plan, and some one must be empowered to adopt a plan, and manifestly the Legislature cannot provide detailed plans of reclamation in such general acts. *Ib.*
8. ———: ———: **When Raised.** Besides, the objection that said part of the act is unconstitutional on the ground that it is a delegation of legislative power to the engineer, not being one that goes to the whole act, does not fall within the scope of the objections which the statute prescribes may be made to the incorporation of the district. *Ib.*
9. ———: ———: ———: **At the Hearing.** Moreover, that objection should be made at the hearing. *Ib.*
10. ———: **Non-Resident Supervisors.** And an objection that the provision of section 5 of the act, authorizing the selection of supervisors who do not reside in the district or county in which the district is situate, violates the principle that "jurors must be of the vicinage," is not an objection that the statute prescribes may be made to the incorporation of the district, and is one that should be made at the hearing if it is to be urged on appeal. Besides, supervisors are not jurors, and the objection is untenable. *Ib.*
11. ———: **Voting by Acres: No Representation by Owners of Personality.** That part of section 5 of the act which provides that in electing the first supervisors each "acre of land in the district shall represent one share, and each owner shall be entitled to one vote in person or by proxy for every acre of land owned by him in such district" is not unconstitutional on the theory that it disfranchises those who own less than one acre and those owning personality only. The exclusion from voting of those who own personality only is not objectionable, since personality is not in any wise affected by the act; and since it states each acre shall represent one share, it follows that each fraction of an acre represents a corresponding fractional portion of a share, and its owner is authorized to vote accordingly. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

12. ———: **Excessive Indebtedness: Special Taxes.** An objection that the large sums necessary to construct the contemplated improvement will create an indebtedness in the form of taxes in excess of and contrary to the constitutional limitation upon taxation, will not avail to defeat the incorporation of a drainage district. The costs of the improvement are benefits assessed against the property, and such assessments are not public taxes. *Ib.*
13. ———: **Sections Applicable to Former Organization.** Section 60 of the Act of March 24, 1913, Laws 1913, p. 232, applies to districts organized prior to April 8, 1905, and objections thereto are not available to proceedings begun under said act. *Ib.*
14. ———: **Inclusion of Railroad.** The Act of March 24, 1913, Laws 1913, p. 232, authorizes the inclusion of a railroad as a part of the drainage district. It is not excluded by section 39, which provides that the word "owner" as used in the act shall not include reversloners, remaindermen, trustees or mortgagees, "who shall not be counted and need not be notified by publication, or served by process, but shall be represented by the present owners of the freehold estate in any proceedings under this act," for that section does not exclude any one, whether the owner of a freehold or an easement in land. *Ib.*
15. **Witness: Competency: Tort: Death of Tortfeasor.** Section 6354, Revised Statutes 1909, declaring that where one of the original parties to a cause of action in issue and on trial is dead, the other party to such cause of action shall not be admitted to testify, applies to actions *ex delicto*; and, therefore, where plaintiff sues a railroad company to recover damages on account of personal injuries claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment, and thereby created the cause of action, and said agent is dead at the time of the trial, the plaintiff is not permitted under the statute to detail in evidence his version of the controversy and the assault made upon him. [*Approving Leavea v. Southern Railroad Co.*, 171 Mo. App. 24, and disapproving *Drew v. Wabash Ry. Co.*, 129 Mo. App. 459.] *Leavea v. Railroad*, 151.
16. **Party to Action: Against Interstate Carrier: Scope of Federal Employers' Liability Act.** The Employers' Liability Act of Congress completely covered the subject of the liability of an interstate carrier to its employees, and superseded all State statutes on the subject; and as it provides that an action for the negligent killing of such an employee accrues to his legal representative, the State statute, authorizing such action to be brought by his widow, is no longer operative, but as to interstate carriers has been *pro tanto* repealed by the exercise by Congress of its constitutional power to regulate commerce among the States. *Sells v. Railroad*, 155.
17. **Consolidated School District: Signers of Petition: Residence.** The petition to the county superintendent for the establishment of a consolidated school district under the Act of March 14, 1913, Laws 1913, p. 721, is not required to be signed by qualified voters of every existing district to be affected. The statute requires the petition to be signed by twenty-five qualified voters of the community, and a "community" may include sev-

STATUTES AND STATUTORY CONSTRUCTION—Continued.

eral districts or parts of districts, and as used in the statute means resident citizens of a locality in more or less proximity. *State ex inf. v. Jones*, 191.

18. ———: **Inclusion of Parts of Districts Not Named in Petition.** The statute does not require that the petition for the establishment of a consolidated school district shall fix absolutely its boundaries. The county superintendent is given authority to include within its boundaries parts of existing districts not named in the petition. *Ib.*
19. ———: **Certification: Addressed to County Clerk.** The statute does not require the certificate showing the proceedings of the meeting by which the organization of the consolidated school district was affected, to be addressed to the county clerk. It simply requires the proceedings of the meetings to be certified to him. *Ib.*
20. ———: **Construction of Statute.** No strict or technical construction is to be put upon the statute authorizing the organization of consolidated school districts. It was designed as a workable method by plain, honest, worthy citizens not specially learned in the law. *Ib.*
21. ———: **Policy of Statute.** As long as the Legislature violates no constitutional restriction upon its acts, the wisdom of any act is not subject to review by the courts; nor can the courts consider the policy of an act authorizing the consolidation of school districts when applied to sparsely settled communities, or when applied to a single district already organized which contains a large part of the voting population in the community or territory affected by the proposed consolidation. *Ib.*
22. **Trust Company Securities: Depositary: State Bank Commissioner.** By the Act of March 25, 1915, repealing articles 1, 2, and 3 of chapter 12, R. S. 1909, and all intervening acts, and enacting three new articles in lieu thereof, the duties theretofore imposed upon the Superintendent of Insurance, as custodian of the securities required of trust companies as a guaranty of the proper performance of the business they are permitted by law to carry on, are transferred to the Bank Commissioner, and the securities required should now be deposited with said officer, and if heretofore deposited with the Superintendent of Insurance they should be transferred to the Bank Commissioner, upon condition of liability for any intervening obligation. *Trust Co. v. Revelle*, 202.
23. ———: ———: ———: **Transfer Upon Condition.** But such transfer should be made only upon the filing of a statement by the trust companies, both with the Superintendent of Insurance and the Bank Commissioner, that the deposit heretofore made with the Superintendent of Insurance shall be subject to any charges or liens which have arisen out of the obligations or business transacted by the trust companies since such deposit was made. *Ib.*
24. **New State Capitol: Furniture.** The Act of March 24, 1911, Laws 1911, p. 108, providing for the building of a new state capitol, invested the State Capitol Commission Board with no authority to purchase furniture for the new building. The board is by it created "for the purpose of building a new state

STATUTES AND STATUTORY CONSTRUCTION—Continued.

capitol," and it specifically says that the terms of its members "shall end with the construction of the building;" and while it makes an appropriation of the money for the construction of building and the purchase of additional grounds, it makes none for buying furniture. *Stephens v. Gordon*, 206.

25. ———: ———: **Purchaseable Out of Other Funds.** The said act limits the State Capitol Commission Board's power to expend money to a sum of \$500,000 less than the bond issue authorized by the people; and the cognate acts disclose that this \$500,000 is the sum set aside by the act submitted to the people as the maximum amount, out of the proceeds of the bonds, which is to be available for other purposes than the construction of the capitol, including furniture, and this entire sum, out of which the provision for furniture is made, the board is directly excluded from using. *Ib.*
26. **Ambiguity in Statute: Resort to Its Title.** Where the terms of an act are ambiguous, resort may be made to its title for whatever light it can give; but resort to the title is not justified if the body of the act is free from ambiguity. And the Act of March 24, 1911, being entirely clear and on its face showing that it does not authorize the State Capitol Commission Board to purchase furniture for the new capitol, it is no consequence that its title covers the furniture as well as its construction. *Ib.*
27. **New State Capitol: Building and Furniture: Single Board.** The act adopted by the people, authorizing the issuance and sale of bonds for building a new state capitol, did not provide that a single board should have charge of the construction of the capitol and the purchase of furniture, nor did it prohibit the creation of separate boards, nor provide for any board at all; but it left the Legislature untrammelled in that respect, and the cognate legislative act invests the only board it created with no power to buy furniture for the new building. *Ib.*
28. ———: **Construing Statute: Convenience.** Likelihood of delay in case furniture for the new capitol cannot be purchased before the meeting of the next Legislature unless it is held that the present State Capitol Commission Board is invested with power to purchase furniture, is an argument from convenience, which has a place in construing ambiguous statutes, but none in construing a clear and unambiguous one. Courts have no power to reconstruct statutes merely for the purpose of making them conform to their ideas of wisdom. *Ib.*
29. **Appeal: Failure to File Abstract: Affirmance: Statutory Requirement.** The affirmance of the judgment appealed from provided by section 2047, Revised Statutes 1909, was not intended necessarily to follow a failure to file a proper abstract within the time prescribed by the rules of the court. The right to affirmance, as prescribed by that statute, seems to have been made to depend upon a failure of appellant to file a complete transcript or a certificate of the judgment and order of appeal in the appellate court, etc., within the time prescribed by section 2048. *Bank v. Kropp*, 218.
30. ———: **Completion: Penalty.** While the appeal is not so far completed as to allow appellate review by the filing of a short-form transcript, it is completed within the purview of section

STATUTES AND STATUTORY CONSTRUCTION—Continued.

2047, Revised Statutes 1909, so far as concerns the penalty of affirmance therein provided; and having been that far completed, Rule 16 steps in and says the penalty for failure to file a printed abstract shall be a dismissal or a continuance. *Bank v. Kropp*, 218.

31. **Local Option Election: Number of Petitioners: Comparison With Poll Books.** The petition for a local option election signed by one-tenth of the qualified voters of that part of the county with embraces no city having 2500 inhabitants or more, vests the County Court with jurisdiction to call the election; and if so signed, the court is not without jurisdiction to call the election, on the sole ground that it is not signed by one-tenth of the qualified voters as shown by the poll books of the last general election. The proviso of the statute (Sec. 7238, R. S. 1909) declaring that "the County Court shall determine the sufficiency of the petition presented by the poll books of the last previous general election" simply means that the court shall take the presumptive evidence of the poll books that the names truly set forth the qualified voters who reside in the locality entitled to hold the election. If the petition is in fact signed by one-tenth of the qualified voters of such locality, that is enough. The law confers the right of petition upon the resident qualified voters, not upon the names on the polling lists; and if one-tenth of the resident qualified voters signed the petition, an election ordered by the County Court will not be held invalid, although an order therefor did not recite a comparison of the names of the petitioners with those on the poll books. *Bine v. Jackson County*, 228.
32. **Harmonizing Terms.** A construction which defeats the chief object of a statute will never be forced by giving its terms a meaning beyond what is expressly stated. The end had in view, and the paramount intention of the lawmaker, afford a strong reason for harmonizing a statute. *Ib.*
33. **Insurance Company: Organization: Agent to Sell Stock.** Under the statute (Secs. 6895-6902, R. S. 1909) a charter of an insurance company cannot be adopted until its stock is subscribed, nor is there any corporation until the amount of the proposed stock has been subscribed. The persons designated as "corporators" in those statutes are only given power to open and keep open books to take subscriptions to the capital stock; they have no stock for sale, and are not authorized to sell stock upon the market or otherwise; nor do they have power, in behalf of the corporation, to enter into a contract with an agent to sell stock or proposed stock. *Taylor v. Ins. Co.*, 283.
34. ———: ———: ———: **Purpose of Statute.** The statutes mean that the cash paid or secured notes given for the stock of an insurance company, at the time of its organization, shall go into its corporate treasury, and shall not be depleted or diminished by percentages paid to an agent of the corporators for securing subscribers. And they apply in the same way to any surplus obtained from subscribers of the stock. *Ib.*
35. **Dramshop License: Granted During Term at Petition Is Filed.** Section 7201, Revised Statutes 1909, declaring that the petition for a dramshop license "shall be filed in the office of the Clerk of the County Court not less than ten days before the first day of the court to which it is to be presented and remain on file for public inspection and by said clerk laid before the court

STATUTES AND STATUTORY CONSTRUCTION—Continued.

at the first term thereafter, and all dramshop licenses issued contrary to the provisions of this section shall be void," does not render invalid a dramshop license granted at the same term at which the petition was filed. The language requiring the clerk to lay the petition before the court at the first term thereafter simply imposed on him a ministerial duty for the benefit of the applicant, and was never intended to invalidate a license granted by the court in due form at the same term; and especially should such license not be held void for the reason it was granted at the same term the petition was filed, where the applicant with his attorney and the remonstrators were in court at the appointed time, and the application was heard on its merits. [Following *State v. Evans*, 83 Mo. 319; and disapproving *State ex rel. v. Wiethaupt*, 165 Mo. App. 634.]

Held, by WOODSON, J., dissenting, that the statute is not directory simply, but mandatory, nor was it intended for the benefit of the applicant, but was intended to give to the inhabitants of the county an opportunity to be heard and to remonstrate; and the clause declaring that "all dramshop licenses issued contrary to the provisions of this section shall be void" did not have reference only to the filing of the petition, but clearly makes void a license granted at the same term the petition is filed. *State ex rel. v. Wiethaupt*, 306.

36. ———: ———: **Inspection of Petition.** But a dramshop license cannot be granted or the petition therefor heard until ten days after the petition has been filed with the County Clerk. That part of the statute (Sec. 7201, R. S. 1909) is mandatory, and was enacted in order that citizens of the county might have ample opportunity for inspection of the petition, and to file a remonstrance, etc. *Ib.*
37. **Statute Governing Appeals: Applicability to Original Writs.** Cases involving remedial writs reviewable only in the Supreme Court are not within the purview of Section 3938, Revised Statutes, 1909, which by its terms is confined to appeals and writs of error. Any one of such writs, if improvidently sued out of a court of appeals, should be dismissed, because the court has no constitutional power to consider it. *Moberly v. Lotter*, 457.
38. **Public Administrator: Discovery and Probate of Will: After Filing of Notice.** Upon the discovery and probate of a will of deceased after the filing by the public administrator with the clerk of the probate court of notice that he has taken charge of the estate, all his authority and right to administer the estate ceases *ipso facto* and by operation of law; and an order of the probate court vacating the authority assumed by him to act is useless and unnecessary, but one appointing another suitable person administrator with the will annexed is valid. There is no reason why the statute (Sec. 47, R. S. 1909) declaring that "if, after letters of administration are granted, a will of the deceased be found, and probate thereof granted, the letters shall be revoked, and letters testamentary, or of administration, with the will annexed, shall be granted" should not apply to a public administrator who takes charge of an estate under section 305. In *re Brinckwirth*, 473.
39. **Administration: Priority: Discretion of Court.** Notwithstanding the provisions of section 15, Revised Statutes 1909, naming certain persons entitled to priority to administer estates,

STATUTES AND STATUTORY CONSTRUCTION—Continued.

upon the discovery and probate of a will which names no one as executor, the probate court may in the exercise of its sound discretion, and in the face of certain circumstances named in the statute, appoint the public administrator, administrator with the will annexed; but it is not compelled to appoint him, and, if some one else is appointed, no statutory right of his is violated. In re Brinckwirth, 473.

40. **Crime Against Nature: Embraced by Statute.** The statute (Laws 1911, p. 198) declaring that "every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished," etc., makes criminal the act of a man in wickedly and feloniously inserting his sexual organ into the mouth of a woman. Whether or not such act was at common law included in the general terms "crime against nature" is beside the question in view of the words "with the sexual organs or with the mouth" added to the statute in 1911, which were intended to include certain acts which the general common-law terms did not embrace, among others the said act. State v. Katz, 493.
41. **Structure: As Used in Statute: Does Not Include Hoist.** A hoist used in lifting stones to the top of a fire wall which is being constructed, is not either a structure or a scaffold within the meaning of those words as used in the statute (Sec. 7843, R. S. 1909) declaring that "all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles as may be used, placed or deposited thereon;" and a demurrer should be sustained to a civil action for damages bottomed upon a violation of said statute, brought by a workman, who, while riding on a hoist, carrying a stone, was injured when it suddenly broke and fell to the ground. Deiner v. Sutermeister, 505.
42. ———: **Ejusdem Generis As Scaffold.** The "structure" used in said statute is *ejusdem generis* as "scaffold," and both words are to be construed as meaning scaffolds, or contrivances and appliances of similar use and nature to scaffolds, such as platforms, staging, trestles of whatever kind, and ladders supporting planks. 1b.
43. **Non-Resident Minor: Over Fourteen Years: Choosing Curator.** The General Statutes of 1865 did not give to a non-resident minor having real estate in this State, either under or over fourteen years of age, the right to choose his curator, or to have notice of the application for the appointment of a curator. Whittelsey v. Conniff, 567.
44. **Felonious Assault: Wounding With Fists.** Under section 4483, Revised Statutes 1909, which is the maiming or wounding statute, it is not necessary to prove malice or that the assault was made and the wounds inflicted with a dangerous weapon. All that is required is that the infliction of the wounds or great bodily harm be under circumstances which do not render it excusable or justifiable, and which would constitute murder or manslaughter if death had ensued. The wounding and maim-

STATUTES AND STATUTORY CONSTRUCTION—Continued.

ing may be done with the fists, and to support the charged it is not necessary to establish that the wounds were of a dangerous character, or such as are likely to produce death.

Held, by FARIS, J., dissenting, with whom WOODSON, C. J., and GRAVES, J., concur, that it is essential that an information drawn under Sec. 4483, R. S. 1909, aver the circumstances themselves which, if death had ensued, would have made the offense manslaughter, and that not having been done it is unnecessary to rule whether said statute can be violated by an assault with fists, or by the fists aided adventitiously by a finger ring.

Held, also, that if it be true, as announced by the majority opinion, that it is not necessary to establish that the wounds inflicted were of a dangerous character or such as are likely to produce death, it logically follows that any wound is, under said statute, sufficient to constitute felonious assault, and thereby the boundary line between common and felonious assault has been wiped out.

Held, also that said section 4483 denounces but two crimes: 1, The endangering of the life of another; and 2, The infliction of great bodily harm, either by (a) wounding, (b) maiming, or (c) disfiguring. *State v. Webb*, 672.

45. **Class Legislation: Special Road Districts.** Sections 10594 and 10591, Revised Statutes 1909 (repealed and reenacted in 1913, Laws 1913, pp. 674, 675), are not unconstitutional as class legislation. They apply to all road districts which may be organized as bodies corporate and are conducted in conformity with their provisions. *State ex rel. v. Burton*, 711.

46. **False Pretense: Deception: Knowledge of Falsity.** If the person alleged to have been defrauded knew at the time that defendant's pretenses were false, no crime was committed under section 4565, Revised Statutes 1909. *State v. Young*, 723.

47. **Promise to Pay: Bank Check.** If at the time defendant offered his check on a certain bank in payment for the mules, the seller was informed that defendant had no funds in that bank, but defendant promised that by the time the check reached the bank the money to pay it would be there, and the check was accepted under such circumstances, no conviction under section 4565 can stand; for the effect of an agreement to have the money in the bank to pay the check on a future day, was to make of the alleged pretense but a mere promise, and so remove it from the category of crimes. *Ib.*

48. ———: ———: **Made in Good Faith.** Nor need the promise to pay at a future date be made in good faith; for the moment the alleged false pretenses are shown to be naked future promises, the prosecution under section 4565 inevitably and instantly falls. *Ib.*

STATUTES CITED AND CONSTRUED.

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	15, see page 480	51, see page 365
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- p. 114, sec. 10, see page 418
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- p. 111, see page 251

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- p. 48, sec. 21, see page 50

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STRUCTURE.

1. **As Used In Statute: Does Not Include Hoist.** A hoist used in lifting stones to the top of a fire wall which is being constructed, is not either a structure or a scaffold within the meaning of those words as used in the statute (Sec. 7843, R. S. 1909) declaring that "all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling of such materials or articles as may be used, placed or deposited thereon;" and a demurrer should be sustained to a civil action for damages bottomed upon a violation of said statute, brought by a workman, who, while riding on a hoist carrying a stone, was injured when it suddenly broke and fell to the ground. *Deiner v. Sutermeister*, 505.
2. **Ejusdem Generis As Scaffold.** The "structure" used in said statute is *ejusdem generis* as "scaffold," and both words are to be construed as meaning scaffolds, or contrivances and appliances of similar use and nature to scaffolds, such as platforms, staging, trestles of whatever kind, and ladders supporting planks. *Ib.*

STRUCTURE—Continued.

3. **Fire Limits: Definition of Structures.** Within properly defined limits a municipal legislative body may define the objects designed to be affected by its fire-limit ordinances and a court in construing such ordinances is ordinarily bound to follow the city's definitions of buildings and other structures so affected. *St. Louis v. Nash*, 523.
4. ———: **Tent: Lacking Portability: Building.** A structure lacking the element of portability, and being canvas stretched and held in place by a wire cable attached to two large telegraph poles set firmly in the ground and by guy cables run laterally from this main cable to other posts also set firmly in the ground, with a stage, dressing rooms, ticket office and benches built of wood, the whole used as a moving-picture theatre, is not a tent, as that word is ordinarily understood; but under the ordinances of St. Louis declaring that the word "building" shall be taken to mean "any structure for the support, shelter or enclosure of persons, animals or chattels" is a building within the purpose and intent of the fire-limit restrictions. *Ib.*
5. ———: **Reasonable Regulation.** And an ordinance which prevents the carrying on of a permanent business in such a building is a reasonable police regulation. *Ib.*

SUPREME COURT. See Courts.

TAXES AND TAXATION.

1. **Vacating Alley: Abutting Property: Special Taxes.** *Held, arguendo*, that, in the absence of an express statute to the contrary, only such property as fronts along the side lines of a street or alley is chargeable with the costs of a public improvement therein, and land whose side line lies along the rear end of a blind alley is not so chargeable. *Supply Co. v. Iron Works*, 138.
2. **Assessment: District Assessor.** The assessment of personal property in the city of St. Louis, wherein there are ten assessment districts, should be made by the District Assessor, and not by the President of the Board of Assessors. *State ex rel. v. Scullin*, 319.
3. ———: **Upon Information.** The District Assessor called at defendant's residence and there left a blank on which defendant was required to make return of his personal property for taxation, the blank being detached from a stub in the Assessor's book. On the stub the District Assessor made a memorandum of \$50,000 for stocks and bonds and \$10,000 for other personal property, and the book was turned in to the Assessor's office. Thereafter the District Assessor and the President of the Board of Assessors had a conversation regarding defendant's assessment, and the old stub having been destroyed, a new stub was made out, upon which defendant's assessment was fixed at \$500,000, the figures being made by the District Assessor and the stub signed by him, the President saying, "I will be responsible." On the bottom of the stub \$1,000,000 was written by some undisclosed person in red ink, an attempt being thereby made to double the assessment. No attempt was made to ascertain if defendant's personal property exceeded the value of \$60,000 made by the District Assessor, the only evidence on the point being that the District Assessor testified that, when he

TAXES AND TAXATION—Continued.

was requested to change the assessment to five hundred thousand dollars and had stated he did not know just exactly what property defendant had, the President said defendant was a very wealthy man, and the President, who had no personal knowledge of what property defendant owned, testified that he had in some way obtained a typewritten report from some one, he knew not whom, which showed defendant was worth nothing less than five hundred thousand dollars. *Held*, that the second assessment was not made upon information furnished by the President, nor was it the semblance of an assessment, but was invalid, being a bald usurpation of authority on the part of the President. *Ib*.

4. ———: Doubling. And the doubling of the illegal assessment of \$500,000 was likewise a bald usurpation of authority. The doubling of an assessment is not made automatically by the law, but must be made by the assessor. *Ib*.
5. Incorporation Fee: A Tax and Not Fees. The money required to be paid by incorporators as a prerequisite to the issuance of the articles of incorporation is not a fee for clerical services to be rendered by the Secretary of State, but is a tax levied by the State on a corporation at its creation, for revenue purposes. And being a tax they must pay in proportion to the true value of its actual assets taken as capital stock, whatever be the proposed capitalization—the ruling, however, not being applicable to business companies incorporated in pursuance to statute upon the payment into the corporate treasury of fifty per cent of their authorized capital stock. *State ex rel. v. Roach*, 435.
6. Twenty-five Cent Road Tax: Expended by County Court. The provision of section 11 of article 10 of the Constitution authorizing the county court to levy and collect a tax of not more than twenty-five cents on each hundred dollars' valuation, to be used for road and bridge purposes, and for no other purpose whatever, does not give the county court exclusive power to expend the fund, and does not contain a limitation upon the power of the Legislature to authorize the money so raised to be expended by the commissioners of a special road district so clear and unmistakable as to justify the conclusion that such power does not exist. *State ex rel. v. Burton*, 711.
7. Expended by County Court: Administration of County Affairs. Section 10482, Revised Statutes 1909, as amended (Laws 1913, p. 669), providing for the apportionment by county courts of taxes collected for road purposes within certain special road districts, is not unconstitutional on the theory that the Constitution created county courts to transact the business of the counties and vested them with express jurisdiction to construct and repair roads, even though it contains an implied limitation that the road tax fund be expended under the direction of those courts. *Ib*.
8. Legislature: Power of Taxation: Instrumentalities. The power to tax and to appropriate taxes is vested in the Legislature, and may be exercised within its discretion when not violative of an express provision of the Federal or State Constitution, and that power, in the absence of such restrictions, extends to a determination of the time, the amount, the nature and the purpose for which the tax is to be levied, and the creation of the agencies or instrumentalities for its collection and disbursement. *Ib*.

TAXES AND TAXATION—Continued.

9. **Uniform Taxation.** Special road district statutes operate alike upon all persons within the district, and do not violate the rule for uniformity of taxation. *State ex rel. v. Burton*, 711.
10. **Collection of Taxes Within Cities.** The statutes, in authorizing the levy and collection of taxes in special road districts outside of cities, do not violate that part of section 10 of article 10 of the Constitution which forbids the Legislature to impose taxes and appropriate money levied and collected by city authorities to uses and purposes outside of such cities. *Ib.*
11. **Maximum Rate of Taxation.** Special road districts are not included within the provisions of sections 11 and 12 of article 10 of the Constitution which fix the maximum rates of "taxes for county, city, town, and school purposes." *Ib.*
12. **Special Road Districts: Public Purpose.** Taxes expended by a special road district on public highways are used for a public purpose. *Ib.*

TENT AND FIRE LIMITS. See *Structures*, 3 to 5.

TRIALS.

Listing of Cases For Trial: Rules of Court. In view of the facts set out in the opinion it is held that relator is not entitled by writ of mandamus to compel the presiding judge of the circuit court of Jackson county to make an immediate assignment of and set for trial her suit against the Metropolitan Street Railway Company et al. pending in said court. *State ex rel. v. Johnson*, 662.

TRUST COMPANIES.

1. **Securities: Depositary: State Bank Commissioner.** By the Act of March 25, 1915, repealing articles 1, 2 and 3 of chapter 12, R. S. 1909, and all intervening acts, and enacting three new articles in lieu thereof, the duties theretofore imposed upon the Superintendent of Insurance, as custodian of the securities required of trust companies as a guaranty of the proper performance of the business they are permitted by law to carry on, are transferred to the Bank Commissioner, and the securities required should now be deposited with said officer, and if heretofore deposited with the Superintendent of Insurance they should be transferred to the Bank Commissioner, upon condition of liability for any intervening obligation. *Trust Co. v. Revelle*, 202.
2. ———: ———: ———: **Transfer Upon Condition.** But such transfer should be made only upon the filing of a statement by the trust companies, both with the Superintendent of Insurance and the Bank Commissioner, that the deposit heretofore made with the Superintendent of Insurance shall be subject to any charges or liens which have arisen out of the obligations or business transacted by the trust companies since such deposit was made. *Ib.*

VERDICT.

Excessive: Under California Statute: \$18,000. The statute of California authorizes the heirs of one negligently killed to recover "such damages as under the circumstances of the case

VERDICT—Continued.

may be just;" and the courts of that State have held that these words confine the recovery to pecuniary damages alone, but that these do not consist simply of compensation for the destruction of legal rights, but include also the loss to the heir of the society, comfort and care of deceased, and the destruction of those kindly relations of which the heir has the moral right to expect the continuance. *Held*, that a verdict for eighteen thousand dollars for an aged and infirm widow, who lived alone with deceased, an unmarried son aged forty-seven years, a lawyer whose income was from \$2500 to \$3000 a year, domestic in his habits, spending all his evenings with her and supporting her entirely from his own income, negligently killed in California, is too large by eight thousand dollars. *Miller v. Railroad*, 19.

WAIVER.

1. **Parties to Action: Federal Employers' Liability Act: Suit by Wife: By Failure to Plead.** The railroad company did not waive the point that the action for damages was wrongfully brought in the widow's individual name, instead of in her representative capacity, as decedent's administratrix, by failing to plead the Federal Employers' Liability Act in bar to the action, or by proceeding to trial as if the action had been properly brought and prosecuted under the State statute, if the petition alleged the railroad company was an intrastate carrier, and the answer was, among other pleas, a general denial, for such an answer raised the issue of the company's intrastate character. *Sells v. Railroad*, 155.

2. ———: ———: ———: ———: **Superior Power of Congress.** The superior power of Congress cannot be waived, for said Employers' Liability Act gives to the legal representative of the negligently killed employee of the interstate carrier a cause of action, and the undisputed facts being that defendant is an interstate carrier, a petition alleging it to be an intrastate carrier states no cause of action under superseded section 5425, Revised Statutes 1909.

Held, by GRAVES, J., concurring, that the right of the widow to recover damages for the negligent killing of her husband is purely statutory, and is given her by the State statute; but the Employers' Liability Act of Congress, as to interstate carriers and their employees, superseded and *pro tanto* repealed that statute, and left to the widow no cause of action, but declared such cause of action should accrue to his legal representative; and therefore a petition which alleges defendant railroad company was an intrastate carrier and names her, as his widow, in her individual capacity, as plaintiff, states no cause of action, when it is shown that defendant is an interstate carrier. *Ib.*

3. ———: ———: **Not Plead.** The interstate defendant does not waive the supremacy of the Federal Employers' Liability Act and its control of the suit for damages for the negligent killing of its employee, by not pleading it and by treating the case as if properly brought and prosecuted under the State statute, for the reason such act is a public act, of which all courts must take judicial notice, and being such it is not neces-

WAIVER—Continued.

sary to plead it, and for the further reason that the act having superseded the State statute on the subject, no cause of action exists without it. *Sells v. Railroad*, 155.

4. ———: ———: **Pleading Contributory Negligence.** The plea of contributory negligence by the interstate carrier is not inconsistent with the Employers' Liability Act of Congress. Under it contributory negligence can be shown in mitigation of damages, and therefore must be pleaded; while under the State statute contributory negligence is a defense. *Ib.*
5. **Administration: Interrogatories Propounded to Wife.** The filing of interrogatories in a suit by the administrator to recover bonds alleged to be in her possession does not constitute a waiver of the incompetency of the wife to testify to transactions between her and her deceased husband involving the cause of action and in issue, to wit, whether the bonds belong to her or the estate. *Carmody v. Carmody*, 556.

WILLS.

1. **Evidence: Unprobated Will: No Objection.** An unprobated will is not competent evidence of title; but if it is offered and admitted without objection, and there are facts in the record which amount to more than an inference that it had been probated, the trial court will not on appeal be convicted of error in admitting it. *Keyes v. Munroe*, 114.
2. **Parties: Deceased Devisees: Ejectment: Judgment for Whole.** When plaintiffs claim title through a will which devised one-third of the land in fee to his widow, who has died since the suit began, a judgment which gives the whole of the land to the descendants of testator's deceased son and only other devisee, is erroneous, unless there is a showing that said son was the only child of said widow and that she died the owner of said one-third and intestate as to him, or if testate that she devised the land to him or his descendants. *Ib.*
3. **Belated Notice of Administration: Payment of Legacy.** The fact that the executor delayed for nearly two years after letters testamentary were issued to him the publication of notice of administration will not avail him in an attempt to defeat the sale of his land under execution, in pursuance to an order of court to pay a legacy, made more than two years after the letters were issued, but less than two years after notice was given. He cannot invoke his violation of the statute requiring him to give notice within thirty days, as a ground for defeating either the order or execution. *Harter v. Petty*, 296.
4. **Discovery and Probate: After Filing of Notice by Public Administrator.** Upon the discovery and probate of a will of deceased after the filing by the public administrator with the clerk of the probate court of notice that he has taken charge of the estate, all his authority and right to administer the estate ceases *ipso facto* and by operation of law; and an order of the probate court vacating the authority assumed by him to act is useless and unnecessary, but one appointing another suitable person administrator with the will annexed is valid. There is no reason why the statute (Sec. 47, R. S. 1909) declaring that "if, after letters of administration are granted, a will of the deceased be found and probate thereof granted, the letters shall

WILLS—Continued.

be revoked, and letters testamentary, or of administration, with the will annexed, shall be granted" should not apply to a public administrator who takes charge of an estate under section 305. In re Brinckwirth, 473.

5. **Public Policy: Settlement of Litigation.** Absent fraud in its various forms, or unlawful or insufficient consideration, settlements tending to avoid litigation and family discord are not contrary to public policy, whether made by all or only a part of those concerned. *Brandenburger v. Fuller*, 534.
6. ———: ———: **Consideration.** An agreement of a person legally in a position to contest a will, to refrain from opposing its establishment, in consideration that a definite sum of money be paid to him by the residuary legatee, is supported by mutual considerations. *Ib.*
7. ———: ———: **Contest.** Testatrix gave the great bulk of her property to a residuary legatee who was not an heir at law. Five legatees who were heirs and one heir who was not a legatee, together with the marital consorts of two of them, instituted a will contest in the circuit court against said residuary legatee, her husband and thirty-two other persons. Before the action had been tried the eight plaintiffs, and six defendants, some of whom were heirs at law but not legatees, as parties of the first part, entered into an agreement with the said residuary legatee and her husband by which said first parties affirmed said will as the last and lawful will of the testatrix and agreed that it might be taken and proven as such without further objection, and that upon the payment to them of \$9,500, their interest in said estate, whether as heirs or legatees, should vest in said residuary legatee. Of this amount \$1500 was to be applied to the payment of attorney's fees and costs which had accrued in the suit, and the balance was to go in equal shares of \$1000 each to the eight persons directly interested. Thereafter the parties of the first part appeared in open court, announced their desire to discontinue the action, and fully informed the court of the terms and purpose of the compromise agreement. Thereupon, another defendant, who was an heir and legatee, but not a party to the compromise agreement, was permitted, by order of court, to plead as a party plaintiff, and to continue the prosecution of the action, which she did as sole plaintiff, and the trial resulted in a judgment sustaining the will. *Held*, that the compromise agreement was not contrary to public policy, was supported by a valid consideration, was free from fraud, and is binding on the residuary legatee. *Ib.*

WITNESSES.

Competency: Tort: Death of Tortfeasor. Section 6354, Revised Statutes 1909, declaring that where one of the original parties to a cause of action in issue and on trial is dead, the other party to such cause of action shall not be admitted to testify, applies to actions *ex delicto*; and, therefore, where plaintiff sues a railroad company to recover damages on account of personal injuries claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment, and thereby created the cause of action, and said agent is dead at the time of the trial, the plaintiff is not permitted under the statute to detail in evidence his version of the controversy and the assault made

WITNESSES—Continued.

upon him. [Approving *Leavea v. Southern Railroad Co.*, 171 Mo. App. 24, and disapproving *Drew v. Wabash Ry. Co.*, 129 Mo. App. 459.] *Leavea v. Railroad*, 151.

WOUNDING AND MAIMING. See Maiming and Wounding.

WRITS OF ERROR.

1. **Wrongfully Issued By Court of Appeals:** Transfer to Supreme Court. After a writ of error has been timely and properly sued out in a court of appeals in a case of which such court does not have appellate jurisdiction (in this case, because it involves title to real estate), that court has power to transfer the case to the Supreme Court, which will take jurisdiction in the same manner as it would had an appeal in the case been erroneously certified by the trial court to the Court of Appeals and by that court transferred to this court. [GRAVES, J., and WOODSON, C. J., dissenting.] *Moberly v. Lotter*, 457.
2. ———: **Constitutional Limitations and Statute.** The definitions of the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals contained in the Constitution and the limitation upon the right of either to issue writs of error to cases reviewable by it, must be construed in connection with the power given by the Constitution (Section 6 of Amendment of 1884 to Article 6) to the General Assembly to provide by legislation for the transfer of cases from the one court to the other, and that has been done by Section 3938, Revised Statutes 1909, directing the course to be pursued in case the writ is sued out in a court not having appellate jurisdiction. The authority conferred by this statute is not an exercise of jurisdiction, but of a power to determine whether or not jurisdiction exists, and in its absence, as determined by the court, to transfer the case to the court invested with power to review it. The constitutional provision defining the exclusive appellate jurisdiction of the Supreme Court and the courts of appeals applies as well to writs of error as to appeals. *Ib.*
3. ———: **New Suit.** The fact that the writ of error, by which the case was lodged in the Court of Appeals, is a new suit, does not determine the right of that court to transfer the case to the Supreme Court. The writ of error is to be held a new suit only to the extent of determining whether there is a *lis pendens* between the rendition of the judgment in the trial court and the suing out of the writ.
Held, by GRAVES, J., dissenting, with whom WOODSON, C. J., concurs, that the suing out of a writ of error is the beginning of a new suit, and a court of appeals can institute no new suit in a case involving title to real estate, and is without jurisdiction to even take the preliminary step in such a suit; and being without jurisdiction in such case to issue a writ of error, but its issuance being *coram non judice*, it can confer no jurisdiction upon the Supreme Court by a transfer of the case—the issuance of the writ being its own mistake, and not that of the circuit court which may certify an appeal already taken to the wrong appellate court. *Ib.*
4. ———: ———: **Applicability to Original Writs.** Cases involving remedial writs reviewable only in the Supreme Court

WRITS OF ERROR—Continued.

are not within the purview of Section 3938, Revised Statutes 1909, which by its terms is confined to appeals and writs of error. Any one of such writs, if improvidently sued out of a court of appeals, should be dismissed, because the court has no constitutional power to consider it. *Ib.*

5. **Appellate Practice: No Bill of Exception.** If there is no bill of exceptions or motion for new trial, a writ of error preserves only the record proper for review. *Ib.*
6. ———: **Record Proper: Admission in Abstract.** An admission by plaintiffs in error in a condemnation case that the petition contains a detailed description of the lands owned by them and of the parts to be taken, and asserting that for that reason the description is not set out, authorizes a holding that the lands to be taken are described with sufficient certainty. *Ib.*

Rules of the Supreme Court of Missouri

REVISED AND ADOPTED APRIL 10, 1916.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse party or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

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If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

Rule 10.—“Appellant” and “Respondent:” What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of section 2048, Revised Statutes 1909, file a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be pagged and have a complete index at the end thereof, which index shall specifically identify exhibits when there are more than one, and said abstract shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set for a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

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Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and the brief for appellant shall contain under separate heads: (1) a fair and concise statement of the facts of the case without reiteration, statements of law or argument; (2) a statement, in numerical order, of the points relied upon, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not thus specified; and (3) a printed argument, if such is desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall, in a concise statement, correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth.

Rule 16.—Failure to Comply with Rules 11, 12, 13, and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under section 2048, R. S. 1909, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have

SUPREME COURT RULES.

been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

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Rule 24.—Transfers to Court En Banc. A motion to transfer a cause under the provisions of the Constitution from either division to court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Rule 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

Rule 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Rule 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

Rule 28.—When Appeal is Returnable: Certificate of Judgment: Transcript. Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by section 2048, Revised Statutes 1909, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said section 2048 a certificate of judgment, and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 2048, Revised Statutes 1909.

Rule 29.—Oral Arguments. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

Rule 30.—Letters, etc., to Court. All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

Rule 31.—Record Matters on Appeal. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

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Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Rule 32.—Granting Original Writs. No original remedial writ, except *habeas corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

Rule 33.—Procedure as to Original Writs. Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

Rule 34.—Certiorari to Courts of Appeals. No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

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